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1891.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

REPORTERS.

Privy Council . . .	HERBERT COWELL,	*Barrister-at-Law.*
Court of Appeal . .	MARTIN WARE, H. CADMAN JONES, E. S. ROSCOE, T. L. MEARS,	*Barristers-at-Law.*
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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1891.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

The Hon Sir FRANCIS HENRY JEUNE, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1891.

Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

Lord ESHER, Master of the Rolls.

Sir JAMES HANNEN, President of the Probate, Divorce and Admiralty Division.

Sir CHARLES PARKER BUTT, President of the Probate, Divorce and Admiralty Division.

Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,
Sir EDWARD E. KAY,
} Ordinary Judges of Court of Appeal.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

1890. 1891.

[DIVISIONAL COURT.]

1890
Nov. 10.

THE COUNTY OF DURHAM.

Admiralty—County Court—Admiralty Jurisdiction—Breach of Charterparty —Plaintiffs' Ship within Jurisdiction—Venue—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 21—*County Courts Admiralty Jurisdiction Act,* 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 2, 4.

By s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, a county court having Admiralty jurisdiction shall have jurisdiction to try certain causes therein enumerated, viz., salvage, towage, necessaries, wages, damage to cargo or damage by collision, provided the value or amount claimed does not exceed the sums specified in the Act. By s. 21 proceedings in an Admiralty cause shall be commenced: (1) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings. By s. 1 of the County Courts Admiralty Jurisdiction Act, 1869, the two Acts of 1868 and 1869 are to be read as one. By s. 2 of the latter Act Admiralty jurisdiction is given: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship. By s. 4 of the latter Act s. 3 of the Act of 1868 is extended so as to apply to claims for damage to ships whether by collision or otherwise.

The plaintiffs, owners of a steamship, commenced an action in personam in the county court within the jurisdiction of which their vessel then was, against

1890

THE COUNTY OF DURHAM.

the defendants, the charterers, for breach of an alleged warranty in the charterparty as to the depth of water at the defendants' wharf, whereby the plaintiffs' vessel sustained damage whilst at the wharf, which was within the jurisdiction of another county court:—

Held, that as the two Acts of 1868 and 1869 are, by s. 1 of the latter Act, to be read as one, the language of ss. 3 and 21 of the Act of 1868 is thereby extended so as to include the plaintiffs' vessel in an action instituted under s. 2 of the Act of 1869, and that consequently the county court in which the action had been commenced had jurisdiction.

APPEAL by defendants from an order of the judge of the county court of Northumberland, holden at Newcastle, refusing to dismiss the plaintiffs' action for want of jurisdiction.

The question of jurisdiction arose as follows:—

On January 22, 1890, an action was commenced in the county court at Newcastle-upon-Tyne, by the plaintiffs, shipowners of Newcastle, against the defendants for 95*l.* 17*s.* 5*d.* damages alleged to have been sustained by the plaintiffs through their screw steamer, the *County of Durham*, taking the ground on July 20, 1889, at the defendants' wharf at Poole, the steamer having proceeded there in compliance with an alleged warranty as to the depth of water at the wharf, contained in a charterparty dated April 2, 1889, made between Charlton, McAllum, & Co. of Newcastle, and the defendants, and assigned by the former to the plaintiffs.

It was admitted that at the time of the commencement of the action the steamer *County of Durham* was in the Tyne within the jurisdiction of the Newcastle County Court.

On January 28 an appearance was entered by the defendants under reserve as to jurisdiction. On February 3 the defendants gave notice of motion to dismiss the action for want of jurisdiction. On May 17 the order appealed from was made, and the learned county court judge, in giving judgment, stated the facts above set out, and proceeded:—

"So far as the plea (of want of jurisdiction) may be said to depend upon the general Admiralty jurisdiction of county courts over a charterparty of this description, no difficulty exists. The difference which prevailed a few years ago between the High Court of Admiralty and the Courts of Common Pleas and Exchequer on the one hand, and the judges of the Privy Council

on the other, as to whether county courts in Admiralty have not under recent legislation a more extensive jurisdiction in certain matters than the High Court, has been finally set at rest by the decision of the Court of Appeal in the case of *The Alina.* (1) This case and that of *The Cargo ex Argos* (2) are direct authorities for the proposition that an action on a charterparty by the owner or charterer of a ship is an action on an agreement made in relation to the use or hire of a ship within s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (3), and that that Act has given a jurisdiction to the county courts which the High Court of Admiralty did not possess. The omission of any form applicable to the present case from the 'statutory forms' given under the Act of 1868 may be explained, therefore, by assuming that the latter were no doubt those compiled from those in use in the High Court, which had jurisdiction in the cases mentioned in that Act; but not having jurisdiction in cases like the present necessarily supplied no forms applicable to the case before me. The only ground, therefore, upon which a plea in denial of the jurisdiction of the court can prevail is that to which the defendants have mainly limited their contention, viz., that the present action has been entered in the wrong district.

"In the Act of 1869 there is no express clause defining or limiting the district in which proceedings are to be commenced; but by s. 1 of the Act of 1869 (4) the two Acts of 1868–9 are to be read and interpreted as one Act. Turning then to the Act of 1868 (5), s. 21, it is provided that 'Proceedings in an Admiralty cause shall be commenced: (1.) In the county court having

(1) 5 Ex. D. 227.

(2) Law Rep. 5 P. C. 134.

(3) 32 & 33 Vict. c. 51, s. 2: "Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

"(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim for tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds . . ."

(4) 32 & 33 Vict. c. 51, s. 1: "This Act may be cited as the County Courts Admiralty Jurisdiction Amendment Act, 1869, and shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act, 1868."

(5) 31 & 32 Vict. c. 71.

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Admiralty jurisdiction within the district of which the *vessel* or property *to which the cause relates* is at the commencement of the proceedings, and

"'(2.) If the foregoing rule be not applicable, then in the county court having Admiralty jurisdiction in the district of which the owners of the vessel or property to which the cause relates, or his agent in England resides. . . . .'

"It has been strongly contended, and urged with much ability and great reliance upon the forms and procedure in Admiralty, that the words 'vessel to which the cause relates,' can only mean the ship or vessel of the defendant. It is clear that until the passing of the Act of 1869 the jurisdiction of the county court over claims for salvage, towage, necessaries, or wages, or for damage to cargo, or damage by collision, were all in their nature proceedings for services rendered to, or injury done by, the ship or vessel of the defendant, and in any proceeding 'in rem,' the only ship in the contemplation of the parties would naturally and logically be the ship of the defendant; but now by s. 2, sub-s. 1 of the Act of 1869 (1), a county court with Admiralty jurisdiction can try any claim arising out of any agreement made in relation to the use or hire of any ship, and the present action is a proceeding in personam, under a charter-party, for the use or hire of the plaintiffs' ship, and complaining of damage resulting from breach of that agreement.

"It has been argued that the present is not properly a cause relating to a ship; but I do not agree with that view. The expression 'cause' relating to a ship only differs from cause relating to the use or hire of a ship as the greater differs from the less. If an action on a charterparty which, ex concessis, is an action upon an agreement relating to the use of a ship, is not an action relating to a ship, it seems difficult to admit that an action for towage or wages is an action relating to a ship. To what ship, then, does the present cause relate? The proceeding itself is not in rem, but in personam, and the only ship indicated is the ship which is the subject of the agreement of hire for breach of which this action is brought, there is nothing in the words themselves, 'vessel or property to which the cause relates,'

(1) 32 & 33 Vict. c. 51.

which involves any violence of construction in holding them to be applicable to the ship either of plaintiff or defendant, as the case may be. I hold, therefore, that the present cause does relate to the plaintiffs' vessel; and as that vessel was within my jurisdiction at the time the cause was entered, I decide against the application, and I hold that I have jurisdiction to try this action. I may add that s. 4 of the Act of 1869 (1), which extends the jurisdiction of county courts in Admiralty to all claims for damage to ships, whether by collision or *otherwise*, when the amount claimed does not exceed 300*l.*, is plainly intended to cover cases in which damage may be occasioned in many other ways besides collision, and in which the only vessel to which the cause could be said to relate would be the damaged vessel for which the plaintiff brought his action. Whether upon the hearing of this cause it may appear to me more convenient and proper that it should be tried within the jurisdiction of the county court at Poole is a matter which I may have to consider hereafter; but for the present I dismiss the defendants' application, with costs."

J. P. Aspinall, for the defendants. The jurisdiction of a county court is purely statutory, and the general policy of the statutes conferring jurisdiction on county courts is to compel the plaintiff to seek the defendants' forum. The action in this case is in personam; the defendants' registered office is at Poole; the alleged breach of the charterparty occurred at Poole, and the claim is in respect of alleged damages sustained by the plaintiffs' vessel; but the Act of 1869, which extends the jurisdiction of county courts to agreements made in relation to the use or hire of a ship, does not give jurisdiction to the county court within the district of which the vessel to which the cause relates may happen to be; for this latter provision only exists in the Act of 1868, and throughout that Act the proceedings contemplated are in rem, and the only res indicated is that of the defendant. Here there is no res of the defendants at

(1) 32 & 33 Vict. c. 51, s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

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Newcastle, and though sub-s. 3 of s. 21 of the Act of 1868 provides for the making of general orders as to where actions shall be commenced, if the rules under the statute are not applicable, there are no statutory rules or general orders affecting the point. The county court judge at Newcastle had, therefore, no jurisdiction. It is true that under s. 8 of the County Courts Admiralty Jurisdiction Act, 1868, an Admiralty cause may be transferred, on grounds of convenience, from one county court to another; but for an application to change the venue, the proceedings must in the first instance have been properly commenced in a court having jurisdiction, which is not the case here.

Boyd, for the plaintiffs, was not called upon.

SIR JAMES HANNEN, President. I have nothing to add to the judgment of the learned county court judge. The two Acts of 1868 (1) and 1869 (2) are, by s. 1 of the latter Act, to be read as one. If the language of the first Act does not apply, the effect of the second Act is to extend the meaning of that language, and so give the required jurisdiction.

BUTT, J. I concur, though, if it had not been that the two Acts are to be read as one, I should have felt a difficulty.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Botterell & Roche.*

(1) 31 & 32 Vict. c. 71. (2) 32 & 33 Vict. c. 51.

T. L. M.

THE AVON AND THOMAS JOLIFFE.

1890
Nov. 4.

Admiralty—Damages—Collision—Joint Tortfeasors.

In an action to recover damages for collision brought against a tug and a vessel in tow, each of these vessels was found to blame. On motion to amend the judgment by the insertion of words to the effect that each of the wrongdoing vessels was severally liable for one-half only of the entire damages:—

Held, that such amendment ought not to be made.

MOTION to amend a decree.

In an action of collision between the owners of the steamship *Alaska*, plaintiffs, and the owners of the sailing ship *Avon* and the tug *Thomas Joliffe*, defendants, the judge pronounced that the collision was caused by the fault or default of the master and crew of the *Avon* and of the *Thomas Joliffe*, and he condemned the owners of the *Avon* and of the *Thomas Joliffe* in damages and costs, and the decree was so drawn up. The owners of the *Thomas Joliffe*, by their motion, asked that the decree should be altered by condemning the *Avon* and the *Thomas Joliffe* severally each for one-half of the entire damages, and that any balance of such half which the plaintiffs could not enforce against either vessel should be paid by the other vessel or her bail.

Kennedy, Q.C., and *Pyke*, for the *Thomas Joliffe*. The principle of the division of damages between vessels to blame for a collision has been sanctioned in *The Milan* (1), in the case of a claim by owners of cargo laden on board one of the wrongdoing vessels. The same principle is applicable to the case of a claim against two vessels, each of whom has been pronounced to be to blame.

The principle now contended for has been followed in the United States: *The Sterling* and *The Equator* (2); *The City of Hartford*. (3)

[They also referred to the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (4)]

(1) Lush. 388.
(2) 16 Otto, 647.
(3) 7 Otto, 323.
(4) 10 Q. B. D. 521, at p. 538.

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Bucknill, Q.C., and *Mansfield*, for the *Avon*, were not called on.

Raikes, for the plaintiffs.

BUTT, J. This decree has been drawn up in a proper form. It may be that the law as administered in the United States, or in some particular State of the union, allows the recovery of damages in the manner contended for by Mr. Kennedy, and is calculated to work out in the end more equal justice than results from the application of the law of England. But I have no power to follow the authorities cited to me from the United States if by so doing I were to contravene the law of England. I am clearly of opinion that in so doing I should be contravening the law of this country. It is the right of every one who has sustained damage by the joint negligence of two individuals, and who sues them in tort and obtains judgment against them, to enforce it by execution against one or the other of the defendants, or both of them. That is the right of a plaintiff in a common law action. I see no reason why there should be a different one in an Admiralty action; nor do I think that in this case I have anything to do with the Admiralty rule as to the apportionment of damages where both vessels, that of the plaintiffs and of the defendants, are to blame. I must, therefore, refuse this application. The applicants must pay the costs of this motion, both those of the plaintiffs and of the other defendants.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for the *Thomas Joliffe*: *J. Woodburn.*
Solicitors for the *Avon*: *Stone, Fletcher & Hull.*

E. S. R.

[IN THE COURT OF THE ARCHBISHOP OF CANTERBURY (1).]

1890
Feb. 4, 5, 6, 7, 20, 21, 22, 25; *Nov.* 21.

READ AND OTHERS *v.* THE LORD BISHOP OF LINCOLN.

Ecclesiastical Law—Bishop—Illegal Practices in the Celebration of Divine Service—Rubrics—Communion Service—Lighted Candles—Mixing and administering Water and Wine—Eastward Position—Performing manual Acts before the People—Singing of Hymn Agnus Dei—Making Sign of the Cross—Ablution.

A bishop of the Church of England was charged with having committed offences against the law ecclesiastical while officiating as principal celebrant at the service of Holy Communion.

As to the first charge that the respondent permitted lighted candles to be used on the communion table when not required for the purpose of giving light:—

Held, that the mere fact that two lighted candles, not required for the purpose of giving light, were kept standing on the table continuously through the service did not constitute a breach of the law.

As to the charge of allowing water to be mixed with the sacramental wine, and administering the wine and water so mixed to the communicants:—

Held, that mixing water and wine in and as part of the service was unlawful, but that the use of a cup containing water and wine mixed beforehand was not an ecclesiastical offence.

As to the charge of standing during the Communion Service down to the ordering of the bread and wine on the west side of the table and not on the north side thereof:—

Held, that the act above described was not illegal.

As to the charge of performing the manual acts whilst standing in such a position that they could not be seen by the communicants:—

Held, that the manual acts must be performed so as to be visible to the communicants.

As to the charge of permitting the hymn Agnus Dei to be said or sung immediately after the prayer of consecration:

Held, that this was not an illegal addition to the service.

As to the charge of making the sign of the cross during the absolution and the benediction:—

Held, that this action was a ceremony additional to the ceremonies of the Church, and was unlawful.

As to the charge of pouring the water and wine into the paten and chalice and drinking the said water and wine as part of the service:—

Held, that the doing of the acts complained of by themselves was not a

(1) The Vicar-General of the Province of Canterbury (Sir J. P. Deane) sat with the Archbishop, and also the Bishops of London, Hereford, Rochester, Oxford, and Salisbury, as assessors.

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ceremony, and that having been done after the benediction, and not as part of the service, they were not unlawful.

HEARING of a suit wherein the Lord Bishop of Lincoln was charged with having committed certain offences against the law ecclesiastical. The case had already been before the Court on two preliminary points relative to the jurisdiction of the Court. (1) The respondent was charged with having committed these offences when officiating as principal celebrant at the administration of the Holy Communion in the church of St. Peter at Gowts, in the diocese of Lincoln, on December 4, 1887, and in the cathedral church of Lincoln on December 10, 1887. The articles substantially charged the respondent as follows: That the respondent permitted to be used lighted candles on the communion table, or on a ledge immediately over the table, and so constructed over the table as to appear to form part of the table, and when not wanted for the purpose of giving light. That he caused and permitted, and was a party to the mixing of water with sacramental wine, consecrated it and administered it to the communicants. That the respondent stood during the Communion Service down to the ordering of the bread and wine on the west side of the table and not on the north side thereof; that he stood whilst reading the prayer of consecration on the west side of the holy table with his face to the east, between the people and the table, and with his back to the people, so that the communicants could not see him break the bread nor take the cup into his hand, according to the directions of the rubric. That the respondent caused or permitted to be sung before the reception of the elements, and immediately after the reading of the prayer of consecration, the hymn commonly known as the Agnus Dei, that is, "O Lamb of God," &c. That the respondent, whilst pronouncing the absolution conspicuously and ceremoniously, having both his hands elevated and looking towards the congregation, made with his hands the sign of the cross, and also that he again in like manner, whilst pronouncing the benediction in the same service, made the sign of the cross, such sign being a ceremony in addition to and other than a ceremony prescribed to be used in the service for the adminis-

(1) 14 P. D. 88, 148.

tration of the Holy Communion by the Book of Common Prayer.

That the respondent, without any break or interval, and as connected with and as forming part of the rites and ceremonies of the above-mentioned service, caused, practised, permitted, and was a party to, and took part in, the ceremony of ablution—that is to say, of pouring wine and water into the paten and chalice which had been used for the administration of the Holy Communion at such service, and by himself then drinking up such wine and water in the face of the congregation, being a ceremony in addition to and other than a ceremony prescribed to be used in the service for the administration of the Holy Communion by the Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church.

In his responsive plea, the respondent, as regards the first charge, submitted that the practice alleged against him was lawful. As to the second charge, he admitted that one of his assistants, after putting the wine into the chalice, added thereto a little water, and that he then consecrated and administered it. The respondent also admitted the third charge, but stated that he had no wish or intention to prevent the congregation from seeing him break the bread and take the cup into his hands; he admitted the fourth charge, the fifth charge, and the sixth charge; and, finally, denied that any of the acts committed by him were unlawful.

Certain witnesses (not being communicants) gave evidence as to the position of the respondent during the celebration of the Holy Communion, and stated that the manual acts could not be seen by the communicants; they also gave evidence as to the performing of the acts of ablution, such acts were proved to have been done after the benediction.

Sir H. Davey, Q.C., (*Tristram, Q.C.*, and *Danckwerts*, with him), for the promoters. The respondent has been guilty of an ecclesiastical offence by violating the law ecclesiastical in regard to certain rites and ceremonies. The question turns on the construction of Acts of Parliament and of the rubrics in which the law is laid down. The rubrics must be construed strictly in the

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same manner as an Act of Parliament, and the Court is not concerned with motives: *Faulkner* v. *Litchfield.* (1) Another general canon of construction is that what is not stated to be permitted is prohibited: *Westerton* v. *Liddell* (2), and that the rubrics are in themselves a sufficient guide: *Martin* v. *Mackonochie* (3); *Hebbert* v. *Purchas* (4); Canon 14 of 1603.

As to the particular charges. The acts done by the respondent have all been held illegal in terms, except one, and the decisions touching them are binding on the Court, especially those of the Privy Council, since the latter are the judgments of Her Majesty in Council, and so bind all persons, the Sovereign being the ultimate Court of Appeal. (5)

As to the lighted candles on the communion table, they have been held to be unlawful: *Martin* v. *Mackonochie* (6); *Sumner* v. *Wix* (7); *Martin* v. *Mackonochie* (second suit) (8); *Clifton* v. *Ridsdale.* (9)

The practice of mixing water with wine has also been held to be unlawful: *Martin* v. *Mackonochie* (10); *Hebbert* v. *Purchas* (11); *Clifton* v. *Ridsdale.* (9)

The next charge is as to the position of the respondent during the Communion Service: he is charged with breaking the bread and taking the cup into his hand, standing in such a position that the communicants could not see the manual acts. This is a question of fact, and it is submitted that it is proved that the respondent did not comply with the rubric.

The respondent is also charged with not standing at the north side of the table as he is commanded to do, but on the west side, at the north end thereof; this position is illegal: *Hebbert* v. *Purchas* (12); *Ridsdale* v. *Clifton.* (13)

The next charge is that of singing the hymn "O Lamb of God," or the Agnus Dei, as it is usually termed, before the

(1) 1 Rob. Ecc. Rep. 184.
(2) Moore's Spec. Rep. 187 (Lond. 1857).
(3) Law Rep. 2 P. C. 365, at p. 382.
(4) Law Rep. 3 P. C. 605, at p. 652.
(5) 25 Hen. 8, c. 19.
(6) Law Rep. 2 P. C. 365, at p. 385.
(7) Law Rep. 3 A. & E. 58.
(8) Law Rep. 4 A. & E. 279, at p. 289.
(9) 1 P. D. 316.
(10) Law Rep. 2 A. & E. 116.
(11) Law Rep. 3 P. C. 605, at p. 651.
(12) Law Rep. 3 P. C. 605, at pp. 657, 662.
(13) 2 P. D. 276, at p. 339.

administration of the communion to the communicants. This is not ordered by the rubric, and therefore falls within the general principle already stated, as to omission being prohibition. The practice has been also directly declared illegal: *Elphinstone* v. *Purchas* (1); *Martin* v. *Mackonochie* (second suit). (2)

The fifth charge is that of making the sign of the cross at the end of the service. It is a ceremony not directed by the rubrics, and therefore prohibited; it has also been pronounced against by the Courts: *Martin* v. *Mackonochie* (second suit). (2) Regarding these charges as a whole and not individually, it is important to bear in mind that such ceremonies as the mixing of water and wine are prescribed by the first Prayer Book of Edward VI., but in subsequent prayer books are omitted; there is, therefore, a definite intention shewn that they shall cease.

The last charge is as to the performing of the ceremony of ablution. This act was a ceremony, and was intended as such by the respondent. It was a ceremony well known in pre-Reformation times; it is not now lawful, because it is prohibited by the general rule laid down in *Westerton* v. *Liddell* (3), and *Martin* v. *Mackonochie.* (4)

Sir W. Phillimore and *Jeune, Q.C.* (*A. B. Kempe*, with them), for the respondent. The respondent has not been guilty of any ecclesiastical offence. It may be admitted that the Act of Uniformity of Elizabeth (1 Eliz. c. 2) forbids ceremonies other or less than those which the Prayer Book contemplates; but the latter contemplates, in addition to its own rubrics, an existing body of knowledge, and refers to extraneous authority. The rubrics are framed on this hypothesis, viz., of a mass of existing usage, to which reference can be made. As to the Prayer Books of Edward VI., the second was only the first explained and perfected, without any alteration of doctrine. The service of the Church could not have been carried on simply by means of the directions contained in the rubrics of the first Prayer Book. The Act of Uniformity of Elizabeth (1 Eliz. c. 2) retains the second Prayer Book quoad the prayers, and brings back the

(1) Law Rep. 3 A. & E. 66, at p. 98.

(2) Law Rep. 4 A. & E. 279, at p. 289.

(3) Moore's Spec. Rep. 187 (Lond. 1857).

(4) Law Rep. 2 P. C. 365.

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ornaments of the Church and the ministers of the first Prayer Book; so that it is no valid argument against a present practice that it was a legal one under the first Prayer Book.

Under s. 25 of the Act of Uniformity, such ornaments are to be retained and be in use as were in use by authority of Parliament in the second year of Edward VI. This section is binding now, and is not touched by the Advertisements so far as regards ornaments, whatever may be the case as to vestments: *Westerton* v. *Liddell.* (1) The rubric at the end of the Baptismal Service in the present Prayer Book refers to canon 30 of 1604, which lays down that "the abuse of a thing doth not take away the lawfulness of it," and that the Church of England may retain ceremonies in use in other churches so long as they neither endanger it nor offend the minds of sober men. Ornaments in use by authority of Parliament in the second year of Edward VI., were (*a*) those mentioned in the first Prayer Book; (*b*) those required by any practice or use therein directed, e.g., pulpit for sermons: (*c*) those used under, or subsidiary to, or not inconsistent with, the first Prayer Book; (*d*) those directed by the canon for the time of 25 Hen. 8. Certain ornaments once held illegal are now used without objection, e.g., flowers on communion table, condemned by Bishop Phillpotts in 1845; credence table, condemned in *Faulkner* v. *Litchfield* (2); elaborate cloths on the communion table, *Westerton* v. *Liddell.* (3) As to the argument that no departure from the Prayer Book is legal, if this were so, the services of the Church could not be carried on. But omission is not prohibition; certain things are lawful which are not ordered. (1.) Things legal never ordered in terms in any prayer book, e.g., coloured cloths. (2.) Things always legal, but not ordered at first, e.g., linen cloth at time of sacrament. (3.) Things always legal, being ordered at first but omitted in later prayer books, e.g., manual acts. (4.) Things illegal, being forbidden in terms in the earlier prayer books, but the forbidding being omitted in the later, e.g., elevation of the cup.

The Preface to the Prayer Book orders a reference to the bishop for the "resolution of all doubts" concerning the things

(1) Moore's Spec. Rep. p. 159 (Lond. 1857).

(2) 1 Rob. Eccl. Cas. 184, at p. 256.

(3) Moore's Spec. Rep. 188 (Lond. 1857).

contained in the Prayer Book; if omission be prohibition, this direction loses all meaning. *Shipden's Case* (1) illustrates how usage must be referred to. Again lay baptism, though not sanctioned by the rubrics of the present prayer book, has been held lawful from force of ancient usage and of former rubrics, which have never expressly been declared unlawful, *Escott* v. *Mastin* (2), and this illustrates the proposition contended for.

In the absence of complete directions in the Prayer Book, the construction of the rubrics is not a matter on which a priest or bishop should be indicted or proceeded against as for crime, but a matter to be determined by pastoral authority. If a matter of ecclesiastical interpretation is in doubt, the Court should not be rigid in inflicting punishment: *Queen's Proctor* v. *Stone* (3); *Gorham Case.* (4) [On the point of the interpretation of the rubrics, they also referred to *Williams* v. *Bishop of Salisbury* (5), and *Sheppard* v. *Bennett.* (6)]

As to special charges. First, the use of lighted candles on the communion table. It is admitted that this practice has been held unlawful: *Martin* v. *Mackonochie.* (7) But fresh information can now be brought to bear on the question, and the Court, under such circumstances may reconsider the question: *Ridsdale* v. *Clifton.* (8) The respondent contends that these lights are legal, because they are only decorations. But, assuming them to be ornaments, they are lawful, because they were in use in the second year of Edward VI., since the present Prayer Book orders ornaments, which were used under the first Prayer Book of Edward VI.: *Westerton* v. *Liddell.* (9)

As shewing the legality of these lights at the time of the first Prayer Book of Edward VI., reference may be made to the terms of the Injunctions of Edward VI. Evidence of usage may be found in the letters of Bucer and Fagius to the Ministers at Strasburg (10), and of Hooper to Bullinger (11) (1549), and in

(1) Palmer's Rep. 297; 2 Roll. Abr. 221.
(2) 4 Moo. P. C. 104.
(3) 1 Hagg. Consist. Rep. 429.
(4) Moore's Spec. Rep. of the *Gorham Case* (Lond. 1852).
(5) 2 Moo. P. C. (N.S.) 375, at p. 424.
(6) Law Rep. 4 P. C. 350 (401).
(7) Law Rep. 2 P. C. 365.
(8) 2 P. D. 276, at p. 306.
(9) Moore's Spec. Rep. 159 (Lond. 1857).
(10) Parker Society Orig. Letters, ii. p. 535.
(11) Parker Society Orig. Letters, i. p. 72.

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Hooper's Sermons (1), also in the Inventories referred to in *Martin* v. *Mackonochie* (2), and those printed in the Chetham Society's Publications. (3) [They also referred to Parker on the Ornaments Rubric (4); Cosin's Works (5); Gunton's History of the Church of Peterborough (6); Drake's Eboracum (7); Picart's Ceremonies and Religious Customs (8); Chambers' Divine Worship in England in the 13th and 14th centuries. (9)] Such lights were used in James the First's Chapel at Madrid. (10)

As to the mixed chalice. If it is lawful to administer it mixed, the time and place of the mixing is immaterial. To administer it mixed is lawful. The mention of putting "wine" on the table does not exclude water and wine; the first Prayer Book of Edward VI. speaks of "wine," after speaking of the previous addition of water to the wine; the expression "wine" means that the essential part of the liquid is to be wine: Sarum Missal (11), Consuetudinarium Ecclesiæ Lincoln (12); Mabillon, Museum Italicum. (13) This meaning is sanctioned by primitive usage: Wordsworth, Church History (14); Scudamore, Notitia Eucharistica (15); Cosin's Works. (16) The silence of the present Prayer Book as to mixing water and wine is not prohibitive. The early English Reformers did not object to the practice: Whitaker's Disputation on Scripture (17), Fulke's Defence of the Translation of the Holy Scripture. (18) The same practice prevailed in later times: Bilson, The True Difference between Christian Subjection and Unchristian Rebellion (1586) (19); Two Discourses, wherein it is proved that the Church of England blessett & offerett the Eucharistick Elements. (20) It was even

(1) Second Rep. to Ritual Commission, App. p. 23.
(2) Law Rep. 2 P. C. 365.
(3) Vols. cvii. and cxiii.
(4) Pages 29 and 37.
(5) Vol. v. p. 440.
(6) Page 334.
(7) Page 524.
(8) English Translation, 1731-37, vol. vi. p. 79.
(9) Page 286.
(10) Colliers' Ecc. Hist. (Lond. 1840), vol. vii. 433.
(11) Ed. F. H. Dickinson, Bruntisland, 1861-83, p. 649.
(12) Ed. H. E. Reynolds, Leeds, 1880, p. 23.
(13) Vol. ii. p. 103.
(14) 3rd ed. vol. i. p. 63.
(15) 2nd ed. pp. 388, 397.
(16) Vol. v. pp. 152, 153.
(17) Parker Society, p. 582.
(18) Parker Society, p. 522.
(19) London, 1586, p. 476. (King's Lib. B. M.)
(20) With a "preface, shewing in what sense the church allows praying for the saints departed, and that mixt

approved by Wesley and his followers in 1733. (1) Again the practice was followed at the consecration of a chapel in the parish of Dore by Field, Bishop of St. David's (2); it was directed in regard to the chapel of Charles II. (3) It was also customary in the established church of Scotland: Worship and Offices of the Church of Scotland, by Dr. G. W. Sprott. (4)

The mere mixing of the water and wine is not a ceremony in itself, though if accompanied by prayers or gestures it might become one. Therefore it is submitted that the decision of Sir R. Phillimore in *Martin* v. *Mackonochie* (5), and of the Privy Council in *Hebbert* v. *Purchas* (6) are wrong.

As to the position of the respondent during the celebration of the Holy Communion: first, as to the charge of not standing at the north side. The direction in the rubric is satisfied if the celebrant stands at the north side of an imaginary line drawn from the centre of the table. The table was originally placed tablewise and not as an altar and "north side" had then a clear meaning, whereas "north end" would be the appropriate term if the priest were to stand at the end. Dr. Stephens' argument in *Clifton* v. *Ridsdale* (7) on this point is adopted by the respondent. Bishop Wren in 1636 was impeached, because by turning the table altarwise he prevented there being a "north side." (8) [The coronation service of Charles II. was referred to in "The Entertainment of His Most Excellent Majesty Charles II." (9) (1662), and the present Coronation Service in Phillimore's Ecclesiastical Law. (10)]

As to the second point under this head: "before the people" simply means during the prayer of consecration—coram populo, then and there, as opposed to in the vestry or later. [Reference was made to Cosin's Works (11) as to the reason for the new rubric

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wine is not contrary to any of her rubricks." [By George Smith]. Printed 1732.

(1) The Life and Times of Wesley, by L. Tyerman, vol. i. p. 95.

(2) Wharton MSS. (Lambeth Library), vol. 577, p. 147 (1634).

(3) Wilson's Sacra Privata (ed. W. Denton, Oxford and London, 1853), p. 107.

(4) Page 241.

(5) Law Rep. 2 A. & E. 116.

(6) Law Rep. 3 P. C. 605.

(7) 2 P. D. 276.

(8) Cobbett's State Trials, vol. iv. pp. 29, 30.

(9) By John Ogilby, p. 173.

(10) Page 1064.

(11) Vol. v. p. 516.

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of 1662.] Udall, who was relied on by the Privy Council in *Hebbert* v. *Purchas* (1), is no authority. His Communion Comeliness (1641) was an argument against high pews, and he was only an ordinary parish priest in London. Further, in this case there was no intention in fact to prevent the communicants from seeing the manual acts and the "good faith" exists which was required by the Privy Council in *Ridsdale* v. *Clifton*. (2)

As to the singing of the Agnus Dei immediately after the prayer of consecration: as it is used later in the service it follows that there is nothing illegal in the hymn itself. As to using it in this order: it is not illegal for hymns and collects to be used in places other than those in which they are expressly directed by the rubrics, e.g., the collect which begins "Preserve us, O Lord," is constantly used before the sermon, though it is not ordered to be used there. As to the making the sign of the cross: the rubric at the end of the first Prayer Book of Edward VI. left crossing to be used at every man's discretion—that rubric declared the mind of the Church, and as there is no rubric prohibiting the making the sign of the cross, it may be done if thought right now, omission not being prohibition. It is not a ceremony within the meaning of the statute of Elizabeth (1 Eliz. c. 2, s. 4.) As to the so-called ceremony of ablution—the acts done by the respondent were not a ceremony, and they were a scrupulous compliance with the directions of the rubric.

Sir H. Davey, Q.C., in reply. The two Prayer Books of Edward VI. differ vitally, and any attempt to set up the first prayer book as now equal in authority to the second is an attempt to alter the existing law of the Church. The respondent's counsel, though nominally accepting the decisions of the Courts of Law, in reality denies their authority; these decisions are binding on this Court as they now stand, and ambiguity in the rubrics in regard to the matters complained of by the promoters has been cleared away by judicial decisions, and their true construction has been ascertained.

It is clear that the use of candles is unlawful when they are used in a ceremonious way, and instances of their improper use in past times will not make them lawful now; the practice received no justification from the injunctions of 1547. The practice of mixing water with wine is not only condemned by authority;

(1) Law Rep. 3 P. C. 605. (2) 2 P. D. 276, at p. 343.

it is in fact a ceremony, and is also absolutely prohibited by judicial authority. As to standing at the west side of the table: in the visitation articles of Bishop Juxon (1640) end and side are treated as being identical.

As to standing so that the manual acts could not be seen, the rubric is precise; the acts are to be seen, and the respondent not having been called to explain what he did, the intention must be inferred from the facts, and the conclusion to be drawn is that these acts were intentionally concealed from the people.

The singing of the Agnus Dei was illegal, because connected with the doctrine of the Mass.

The sign of the cross is a ceremony, and is unlawful.

Cur. adv. vult.

Nov. 21. The ARCHBISHOP OF CANTERBURY. In the course of this trial three distinct and independent questions have been under consideration. The first of these had reference to the jurisdiction and authority of the Court itself; the second had reference to the difference, if any, between the obligation of a bishop and the obligation of a priest to conform to the rubrical directions for the administration of the Holy Communion according to the Book of Common Prayer; and the third had reference to acts charged as offences in respect of certain rubrical details on the part of the Lord Bishop of Lincoln against these and other laws and regulations.

Upon each of these questions the Court has had the advantage of hearing full and learned arguments. The constitutional and inherent authority of the Court was affirmed in the judgment delivered in this hall on May 11, 1889; and the obligation resting upon a bishop, as upon a priest, to conform in the celebration of the Holy Communion to the directions contained in the Book of Common Prayer was affirmed on July 24, 1889. It remains for the Court to deliver judgment upon the merits of the specific complaints of rubrical irregularity which have been brought by the promoters of this suit against the Lord Bishop of Lincoln. These complaints may be summarized as follows:—viz., that the said Lord Bishop, when celebrating the Holy Communion on certain specified occasions, allowed two lighted

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candles to stand upon (or apparently upon) the communion table; added water to the wine, and administered it so mixed; before the consecration prayer stood in what is called the eastward position; during the consecration prayer stood so that certain "manual acts" could not be seen; allowed a hymn, "O Lamb of God," to be sung after the consecration; made the sign of the cross at the absolution and benediction; and took part in what is referred to in the articles as "the ceremony of ablution." These acts, it is alleged, are all and each of them contrary to the law.

The responsive plea for the Lord Bishop submits that the acts which were done by the Lord Bishop or with his sanction "are not . . . any of them illegal acts forbidden by the laws, canons, and constitutions ecclesiastical of this Church and Realm"; alleges that the Lord Bishop "had no wish or intention to prevent the communicants present from seeing him break the bread and take the cup into his hand"; and with regard to the action articled as the ceremony of ablution, that "thus" (as described in the responsive plea) "the remains of that which was consecrated were completely and reverently eaten and drunken in accordance with the rubric."

Besides the learned and weighty arguments of the counsel who have addressed us upon either side, the Court has considered with the utmost carefulness and respect the various decisions which have been given in recent years upon some of the points at issue, and the elaborated reasons upon which these decisions have been based, whether by the learned judges of the diocesan and provincial courts or by the very eminent authorities before whom as the Lords of the Judicial Committee of the Privy Council these matters or any of them in any form have come. It cannot be necessary that the Court should express its sense of the importance attaching to such decisions, so far as they bear upon the present case, for the elucidation of these minute and complicated questions. Inasmuch, however, as the points raised in the suit before us, are some of them novel, and all of them are raised under conditions differing from those of former suits: inasmuch also as the researches of later students have brought much fresh information to bear upon historical points admittedly obscure, the Court has not felt it right so to shelter itself under

authority, as to evade the responsibility, or escape the labour of examining each of the points afresh, in the light of this ampler historical research, and of weighing once again all the reasons which may be advanced either for or against any of the actions or usages now under consideration.

In thus sifting to the bottom, so far as it is able, these questions, the Court discharges what appears to be, in the special and peculiar circumstances of this case, its plain and obvious duty.

It is worthy of note that a similar course was adopted and explained by Lord Chancellor Cairns and the Judicial Committee of the Privy Council in the judgment delivered May 12, 1877, on occasion of the appeal brought before their Lordships by the Reverend Charles Joseph Ridsdale.

It should be added that in examining the arguments urged by counsel on either side the Court has followed out the investigation of such corroborative or independent evidence of a historical character as was accessible upon each and all of those points.

In delivering this judgment I am glad to be able to state that all the assessors concur in all the conclusions arrived at except one, and that upon that point there is one dissentient.

The articles will be taken in the order in which they are found to be conveniently treated in relation to each other.

1. *Mixing Water with the Wine.*
2. *Administering the Mixed Chalice.*

The 4th article alleges that the Lord Bishop when officiating "permitted, and was a party to, and took part in the mixing of water with the sacramental wine intended to be used . . . and subsequently at the . . . service consecrated the said wine and water so mixed and thereupon administered the said wine and water so mixed to the communicants . . .": the 13th and 14th articles allege that these acts were "unlawful additions and variations from the form and order prescribed" and "done in contravention of the . . . rubrics prescribing the elements to be used . . . and in respect of the consecration and administering of the same."

The responsive plea states that with the sanction of the Lord Bishop one of the assistants "after pouring the wine into the

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chalice added a little water," and that "the wine and water so mixed" were consecrated and administered by the Lord Bishop.

The article states two heads of charge: (1) The mixing of the cup and (2) the consecration and administration of the mixed cup.

The consecration and administration of a mixed cup do not differ in form or order from the same acts done with one unmixed, and are not an apparent addition to the service in the same sense as the mixing is. It is proper, therefore, to consider these two parts separately.

(1.) The mixing of the cup in the service:—

The adding of a little water to the wine was ordered in a rubric of the Common Prayer Book of 1549 as a ceremony in the service before "setting" the elements "upon the altar." In the book of 1552 this rubric was omitted. Although it may not be proved that everything not ordered in any particular place was prohibited, yet the express removal of so simple a direction as that contained in the words "putting thereto a little clean and pure water" must undoubtedly be understood to mean that the mixing at that place was not to be continued.

It will moreover be shewn presently that there were good liturgical grounds for the removal of the direction, and that those grounds were before the minds of the revisers.

There is now no direction on which the continuance of the practice can be based, nor has any continuous tradition in the Church of such public ministerial act been established.

(2.) The consecration and administration of a mixed cup however is, as the same revisers well knew, a primitive, continuous, and all but a universal practice in the Church.

It is three times mentioned in Justin Martyr's account of the primitive administration of the Eucharist, and is alluded to in the Clementine Liturgy (Hammond, p. xxxix. 17) and by Irenæus, evidently as the only usage known. It is absent, so far as the Court has observed, from only one of the many extant ancient Church liturgies—that of the Armenians.

The question therefore arises whether, the direction being removed to add water to the wine in the service, it remains lawful to use a mixed chalice if the mixing is not done in or during the service.

In the words of the article which state that the cup was administered "*so* mixed," it is presumed that the stress is not confined to the word "so," meaning as mixed at that moment, but that exception is taken to the administration of a mixed cup at all.

When an appeal was before the Lords of the Council which included a question as to previous mixing in the general question of the mixed cup, their Lordships "observed that they doubted whether this part of the article was of much importance," and counsel were not heard on this particular, but the appeal on the whole article as it stood was allowed.

Since it has been thought of sufficient importance to be revived before the present Court, the Court, assisted by learned counsel must come to a conclusion. And there is new matter bearing on the question, which requires to be considered.

The principal arguments hitherto have been three—

(*a*.) That the mixture is symbolical, and that the reception of the mixed cup as well as the act of mixing has a share in this symbolism.

Devout imaginations have always created and dwelt on inner meanings, and always will. But it was long before what is held to have been the original intention, viz., facere quod Dominus Ipse fecit—to do just what the Master was at any rate believed universally to have done—seems to have had a symbolical sense assigned to it. In the middle of the third century the mixing was interpreted of the union between Christ and his people. Three principal liturgies (Ambros., Moz., Syr. S. Jac.) connect it with the effusion from the Lord's side; twelve others, among them the Roman, do not so connect it; two pointedly give a different application to that circumstance (Constant.; Æth.). The Roman sees in it the union of humanity with divinity. Accordingly our strongest Protestant leaders take but slight exception to the mixing, some objecting to it expressly because it had no certain meaning (Tyndale, Answer to Sir T. More, i., 26), some because wine only is mentioned in the Bible (Fulke, Def. c. 17), some because they thought the immingling was originally practised to mitigate the strength of the wine (Whitaker, Disp. xii.); Foxe in his strictures has nothing to say against it,

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simply mentioning that "in St. Cyprian's time it seemeth that water was then mingled with the wine" (Acts vi. 379, Cattley); Jewell was content to leave it as a minor point; Prynne, though he describes and dislikes it, does not enumerate it among offences against the Prayer Book or the law (Trial, pp. 63, 325, 121).

It does not seem possible to condemn the administration of a mixed cup on the ground of symbolical meanings thus unauthoritatively attached to the careful commemoration of the traditional details of our Lord's actions. It does not seem possible that the existence of devout and innocent interpretations, though never generally sanctioned, should in itself be held to overthrow in a court the legality of a custom in the Church. No Church custom could be safe if that were made the rule.

(*b.*) A second argument that has been alleged against mixing before the service is that neither Eastern nor Western Church had any custom of mixing the water with wine apart from and before the services.

Such a fact would alone carry sufficient weight almost to determine the question. It is therefore necessary to examine the statement in what may seem tedious detail.

(1.) As regards the Eastern Church:—In the earliest account of the Eucharist—Justin Martyr's—the cup is not mixed by the presbyter, but brought to him already mixed. In the very ancient liturgy of St. James, he sets on the holy table "a cup of wine tempered with water," the mixing and other things having been done already, as Renaudot observes (Litt. Orient. ii. 53), at the credence ("in the Prothesis," or smaller northern side-apse where the credence is), "or in the vestry or sacristy, according to the Greek rite."

In the liturgies of the great Oriental Orthodox Church—St. Basil's and that called St. Chrysostom's—the deacon before the service pours wine and water together into the chalice, at the credence. The chalice is afterwards brought in and placed on the holy table (Goar, Euchologion, pp. 61, 73; Hammond, Liturgies, pp. 85, 102). The Barberini MS. of the liturgy (cent. 8 or 9, ed. Swainson, 1884) gives as yet no prayer of mixing, and in the first prayer implies that the cup when first placed on the table was ready for consecration. The 11th cent. MS. of the

same (ed. Swainson; Burbidge, Liturgies and Offices, 41) has no mention of the mixing even in the opening prayer said at the credence when the elements are placed on it; yet the later part of the service shews that it was a mixed chalice ("hoc mixtum") which was consecrated, and it must therefore have been mixed in the vestry before it was brought in.

Similarly, in most of the more ancient and widely used liturgies of the East, words in the consecration prayer shew either that the chalice the first time it is mentioned had been already mixed (e.g., Coptic of St. Gregory, Ren. i., 30; of St. Cyril, 46; Alexandrine of St. Basil, 67; Alexandrine of St. Gregory, 104; of St. Mark, 155; of St. James, ii., p. 29); or else they have preparatory prayers like those prefixed to St. Chrysostom's, before the commencement of the service proper, more modern than the liturgy itself, and generally said at the credence or in the vestry. Thus, in the Greek of St. Basil (Swainson, 76), the preparation is *ἐν τῷ σκευοφυλακίῳ*, and the cup is not mentioned until consecration, when it is seen to be already mixed. It precedes the service in the Syriac Jacobite liturgy (Renaudot, ii. 1), the priest putting off his daily dress at the same time. In the Ethiopic rite the preparation of the altar before service includes the mixing of the cup. But on this Renaudot (i., 502, 526) remarks that even this was a departure from the practice of "the Eastern Churches, in which this mixing before the service was done at the credence or in the secretarium (vestry), and not at the altar at all." In an old form of this liturgy (Swainson, 3) the prayers of preparation do not appear.

Of this, then, there can be no doubt, that in the Eastern and Greek Churches the custom was (except in Armenia) to mix water with the wine before the service, and, as a rule, at the credence or in the vestry.

We may now shortly consider whether the omission of the rubric enjoining the mixture as a ceremony in our own service is likely to have been due to the study of that ancient Eastern usage.

We know what was aimed at and what was considered to have been effected by the English office. The "usages of the Primitive Church" were claimed along with Scripture as its standard

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and canon (2, 3 Ed. VI. 1; 5, 6 Ed. VI. 1). Abp. Cranmer's Declaration 1553 (Strype, Cranmer I. 437), dwells on what it had "restored." "I shall be ready to prove that the Communion Book . . is conformable to the order which . . Christ did observe and command to be observed, and which his Apostles and Primitive Church used many years." . . . He offers, in conjunction with other scholars, to "defend," that the Prayer Book and its doctrine are "more pure than any that hath been used in England these thousand years . . . We shall prove that the order of the Church at this present" is the same as in the first century.

This was the aim of the framers of our office, and we are fairly acquainted with their liturgical materials.

Among the principal of these was the liturgy of St. Chrysostom. In Cranmer's note-books are many extracts from its Greek text turned into Latin by himself apparently as he read, and others from the Latin version of Erasmus "which was commonly used by our Reformers" (Burbidge xiii., xxi., 42). We have his copies of two editions of it, one marked by his own hand. In those texts the mixing of the wine is given along with the robing of the clergy before the service.

When therefore the mixing was removed from the position it had in King Edward's first book, this was altogether in accordance with what was then learnt from the study of the earlier liturgies. But there exists no presumption that the use of a mixed cup was intended to be discontinued; rather the contrary, as we may presently see.

(2.) As to Western Churches:—It has been sometimes supposed that mixing before service was not known to them. But attention has been lately directed to facts about them parallel to those observed as to Eastern Churches, and independently pointing to the same conclusion.

The prevailing use was of course that which the Reformers were amending. But in A.D. 1534 was printed at Leipsic and Antwerp, edited by Joannes Cochleus, the treatise and revision by Isidore of Seville of that form of Gallican liturgy called the Mozarabic, as used in the 6th and 7th centuries and long before (Isid. Hispal. De Off. Eccl., Lips. 4to, Antv. 8vo., 1534). This

work was dedicated to Dr. Robert Ridley, uncle of Bishop Ridley. In the dedication Cranmer himself is named as 'Vir eruditus et theologus insignis.' It naturally excited much attention; it is quoted by several of the chief reformers. Scholars are now investigating the large use of it made in other parts of the Books of both 1549 and 1552. It was the more notable because Card. Ximenes had in 1500 refounded the use in Spain in such amplified form as was then possible, which is not so sure to have come under Cranmer's notice. Both forms give evidence which is to the point. A mixed cup was used, but in the antient form there is no order and no prayer for mixing. In the later, the rubric and prayers are included in the præparatio which had in the interval grown up before the Introit and ante-Communion (Burbidge, 196, 202; Lit. Moz. 219, Migne; Hammond, lxiv. 285).

We find therefore that to mingle the cup before service was matter of early usage in the west, and that our revisers seeking for primitive models studied the books in which this usage is preserved.

We are perhaps not wholly in the dark as to Cranmer's own view of what should be done, although too much stress must not be laid on the indication.

In one of his unpublished folios of notes occurs the entry "In Eucharistia vino aqua miscenda est. Lege capitulum coloniense fo. 84." Here he writes, not "that the Cologne chapter is of that opinion," but says, "miscenda est," and refers for illustration to their Antididagma, an important book in the controversy against Archbishop Herman and against his own views in general. The page named shews that he quotes the edition (still at Lambeth) of 1544, and the note might not be much later; but there is (it is believed) no after trace of his having altered his opinion on the point. Too much stress need not be laid on the note, though it falls in with what else we observe of Cranmer's knowledge. If, however, for reasons of primitive antiquity he removed the mixing from the service, it remains probable that for the same reason resting on the same early memorials of Christianity he approved of the previous mixing.

This short critical inquiry has a double result:—

(i) It shews that the practice of mixing water with the wine

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apart from and before the service cannot be disallowed upon the ground that it was unknown to the churches of east and west, which is the second argument (b) advanced for disallowing it. It was a custom existent in both, and in the east all but universal.

(ii) But enquiry has carried us beyond this point, and has shewn that the ceremonial mixture in the service was omitted from our book in accordance with the highest and widest liturgical precedents, and must in our Church be accounted, in the words of the preface, as one "of the accustomed ceremonies which be put away." It has shewn that such precedents were known to the framers of the book, and that in these the mixture of a little water with the wine before the service was (probably for a commemorative purpose) the rule.

(c) The third class of arguments is derived from what is said of the wine in the present Book of Common Prayer. It is pointed out:—

(1) That the curate and churchwardens are required to provide "bread and wine" only.

(2) That the curate is to have "any of the wine that may remain unconsecrated to his own use;" and that this cannot mean wine with water in it—which it would be if mixed beforehand.

(3) That what has been consecrated is still called wine.

But as to (1) This is no liturgical direction: it simply rules how expenses are to be defrayed, viz., "at the charges of the parish." In the King's order of December 25, 1549, is set forth how "divers froward and obstinate persons do refuse to pay towards the finding of bread and wine," so that the "Holy Communion is many times omitted upon the Sunday" (Foxe; B. ix.; vol. vi. 4, Cardwell Doc. A. ii. 87). In this connection the water could not be mentioned either here or for "filling" the font.

As to (2), What the curate is to have is any remnant of wine not presented and consecrated. The rubric desires him to "place upon the table so much as he shall think sufficient," and this is what would be mixed, consecrated, and afterwards all consumed. What was not mixed was his.

As to (3), What has been consecrated is in all antient liturgies called "wine," or "mixtum," or "mixtura," quite indifferently. The wine is the dominant part. A quite typical example is this: "And putting the wine into the chalice, . . putting thereto a little pure and clean water, and setting both the bread and wine upon the altar, then the priest shall say . ." i.e., the very rubric in King Edward's first book, which orders the mixture, in the next six words calls it wine.

There is thus nothing in the words of the service or rubric which precludes mixing.

It remains to be observed that the mixing would be an additional ceremony if done in the service: but if not done in the service at all cannot be an addition to or a variation of the service, for an addition to a service means something so added to it as to make it not the same. No one for example could call that careful semi-division of the bread which is made all but universally before the service with a particular instrument in the vestry, an addition to the service, although the bread can be administered without this being done.

And if the putting a little water to the wine before the service be not upon any ground alleged unlawful, the administering it is not unlawful, for it differs nothing from the administering of the wine without the water.

The Court therefore concludes:—

I. The Church of England has, and in the 34th article declares itself to have, the same authority as any Church Western or Eastern "to ordain change and abolish ceremonies or rites of the Church, ordained only by man's authority." By and within this authority the mixing of the cup was removed from the place it had before held in the public service of the Church. It was so removed in accordance with antient, primitive and very general use of most Churches. To practise it as if it had not been removed is to disregard those precedents and this authority.

II. No rule has been made to "change or abolish" the all but universal use of a mixed cup from the beginning. When it was desirable to modify the direction as to the uniform use of unleavened wafers, a rubric was enacted declaring wheat bread sufficient. Without order it seems that no person had a right to

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change the matter in the chalice, any more than to change the form of bread. Wine alone may have been adopted by general habit but not by law. No rule having been made, it is not within the competency of this Court to make a new rule, in fact a rubric; which it would do if it ordered that a mixed cup should not be used.

The Court decides that the mixing of the wine in and as part of the service is against the law of the Church, but finds no ground for pronouncing the use of a cup mixed beforehand to be an ecclesiastical offence.

3. *Ablution.*

The charge in the 8th and 12th articles is—

(1) That after the benediction the Lord Bishop of Lincoln took part in the "pouring wine and water into the paten and chalice" and "himself drank this wine and water."

With regard to this fact by itself, it is alleged on the other side that the remains of the consecrated elements were first eaten and drunken "as far as could so be," and that water, or water and wine, was then used in order to complete "in accordance with the rubric" a reverent consumption of what remained.

It is not to be assumed that objection is taken to any clergyman's using what he may think the best way of consuming "reverently" all that remains, "if any remain of that which was consecrated," without its "being carried out of the church" (as directed by the rubric). And it is understood that particles of wheaten bread and of the thick sweet wine in common use adhere to the vessels.

The point of the charge therefore lies in the other pleadings, viz.:—

(2) That this was done "without any break or interval, and as connected with and as forming part of the rites and ceremonies of the service."

(3) That the wine and water were drunk "in the face of the congregation."

(4) That this was "The Ceremony of Ablution."

(5) That it is "a ceremony in addition to and other than a ceremony prescribed to be used."

The Court holds that the term "The Ceremony of Ablution" is not fairly applicable to what is here described. Before the Reformation there was such a ceremony. The "minister" after receiving the communion in both kinds himself long before he gave it to any other persons, went through forms of washing and wiping the chalice and his own fingers, with other acts and with several prayers, in places and in postures prescribed for him and for other ministers, as a distinct and integral part of the service still in progress. The proper name of such a ceremonial portion of that service is not justly applied to the *manner* in which, after the service of the Book of Common Prayer was concluded, the last direction to consume what remains was complied with in this case.

Exception nevertheless might be taken, and in the charge is taken, to the *time* and *place* adopted for fulfilling the direction.

The *time* was (it is stated) "immediately after pronouncing the benediction," which must be taken to be after the end of the service. The first rubric after the Communion has the words "concluding with the blessing"—*i.e.*, the blessing given, the service is concluded. And the rubric before the blessing is "The priest (or bishop if he be present) shall let them depart with this blessing"—*i.e.*, the service being then over.

It was urged in evidence that most of the communicants were still present. But it is contemplated in the rubric that they will be present; for some "of the communicants" are to be "called" to take part in "reverently" consuming what remains of that which was consecrated—*i.e.*, manifestly if there is enough remaining to require distribution. This is ordered to be done "*immediately* after the blessing," and the cleansing of the vessels appears to be not an improper completion of this act which is ordered to follow the close of the service without any break or interval.

As regards the *place* at which this was done, the article states that it was performed "in the face of the congregation." And it was deposed, in support of this, that it was performed by the celebrant standing with his back to the people in the middle of the front of the table. But this is the identical position which in articles 5 and 10 is stated to prevent the manual acts in con-

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secration from being done, according to the directions of the rubric, that is "before the people." The Court is not called upon to reconcile these two averments, that one act performed in this position was not done "before the people" and that the other was done "in the face of the congregation."

Nevertheless since the decision as to the legality of the act finally turns upon this question of *place*, the Court is bound to express a judgment upon it.

The rubric gives a general direction as to what is to be done in the way of consuming what remains after the service, and is not so minute as to go beyond this, our book having abandoned many over-niceties of regulation. If a conscientious scruple is felt as to not "carrying out of the church" slight remnants even into the vestry, it is not the duty of this Court to override it, and the credence is a suitable place for completing the consumption. In antient liturgies, which cannot be held to fail in punctilious reverence, after the words of dismissal the minister goes into the prothesis (the side apse where the credence is) and there consumes the last remnants (see Goar, Euch., p. 86). In neither of those liturgies, which were in Cranmer's hands and used by him, (as we have seen), are any directions given. If it were the duty of this Court to point out where and when, if not at the Holy Table, the minister would most properly complete the consumption of the consecrated elements in such way as he might think to be necessary in compliance with the rubric, the Court would unhesitatingly say At the Credence, or in the place where they had been prepared. Nevertheless the Court cannot hold that the minister, who, after the service was ended and the benediction given, in order that no part of the consecrated elements should be carried out of the church, cleansed the vessels of all remnants in a reverent way without ceremony or prayers before finally leaving the holy table, would have subjected himself to penal consequences by so doing.

In this case it would have been illegal to vary the service by making "the ceremony of ablution" charged in the articles, or the like, appear to be part of it, but the evidence does not shew that this was done.

This charge must be dismissed.

4. *Eastward Position in the first part of the Communion Service.*

It is stated in Article 9 that the Lord Bishop of Lincoln, officiating in his cathedral, on a day named, "stood during the whole of the" communion "service down to the ordering of the bread and wine before the prayer of consécration on the west side of the holy table, and not on the north side thereof." By "north side" is here understood the short end set towards the north. The responsive plea (10) states that "down to the creed he (the bishop) stood or knelt as required by the rubrics in front of the holy table, and at the northern part thereof, this being the north side of the table as directed by the rubric," and that "during the reading of the ten commandments he turned to the people as directed by the rubric."

The Court remarks that there is no proper allegation of illegality brought against the Lord Bishop on this particular; any charge of offending against any statute, rubric, or canon being markedly omitted from Articles 13, 14, 15, which summarise the offences charged. Nevertheless, inasmuch as the responsive plea contains a defence of the action described, as well as out of deference to the arguments of the learned counsel on both sides, the Court has thought it advisable to consider, and give its opinion upon, the question.

To pass over the apparent difference as to the point of the service up to which the position presumably intended to be charged as illegal was kept, and the apparent statement that the posture of standing was used during the prayer of humble access,—the Lord Bishop claims to have precisely observed the rubric, but contends for a different interpretation of the term "north side" from that which the promoters attach to it.

The Dean of the Arches in *Elphinstone* v. *Purchas* (1) adopted the sense taken by the promoters, remarking that possibly the term bore the other sense, but that, as the question had not been argued before him, he took the *primâ facie* meaning. The same meaning has been taken by other authorities, but no argument had yet been heard upon it until the learned counsel in this

(1) L. R. 3 A. & E. 110.

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case treated it forcibly on each side. The meaning and application of the term have now to be subjected to historical inquiry, which it is not possible for this Court to waive by affixing, at their own choice, a meaning to the term as it stands by itself.

The line of this inquiry will be to learn the conditions which called for the introduction of the term "north side" into our liturgy and what was understood by it at the time: whether any later variation of conditions affected the application of the term since the last revision of the Prayer Book: what the practice has been and upon what grounds.

I. The first Prayer Book of King Edward became the one Use in the realm on Whitsunday, 1549. Its rubric ran that "the priest" should begin the communion service "standing humbly afore the midst of the altar." The principal altar was then set against the east end of the chancel or against a screen near and parallel to the east end, with its longer measure from north to south. This rubric was in continuation of usage until then practically universal.

II. Very shortly afterwards (at some places in the same year —Strype, M. II. i. 356) "altars" began to be "abolished," and tables to serve instead of them were set lower in the chancel or in the body of the church. In the following year, 1550, on the 5th of March, Bishop Hooper preached before the king an effective sermon in favour of that change. In April Bishop Ridley was translated to London, and in June in the injunctions at his visitation he observes that already "in divers places some used the Lord's board after the form of a table, and some as an altar," and that "dissension is perceived to arise among the unlearned" in consequence (Cardwell, Doc. An. i. 94). He went on not to order (Burnet comments on the soft words) but to "*exhort* the curates, churchwardens and questmen present to erect and set up the Lord's board after the form of an honest table, decently covered, in such place of the quire or chancel as shall be thought most meet by their discretion and agreement . . . ." He did not order altars to be removed, which probably he felt might exceed his powers at present. He was held to have "defended his doings by the king's first book" (Strype,

An. I. i. 240), and no doubt he acted "to appease the diversity" which he speaks of, upon the authority assigned to the bishops in the Preface to the Common Prayer "to take order for the quieting and appeasing of all doubts" (Foxe, II. p. 700, 6th Reason). This use of it, however, went beyond the definition.

In his own cathedral, on June 11, he substituted a table, and by removing the screen behind it threw it into the midst of the choir; and tables were shortly after placed in the other churches in London (Foxe, Bk. ix v. II. p. 700; Ridley, 324 P.S.; Stow, Annals, p. 604, ed. 1614; Wheatley, VI. i. 227).

In the end of June the council commissioned the high sheriff of Essex, then in London diocese, not only to give effect to the bishop's "exhortation," but also to remove the altars (Strype, A. I. c. 28). And on the 19th or 24th November, a letter from the king and council, apparently addressed originally to Bishop Ridley (Cranmer's Remains, p. 524; Cardwell, I. 101), was sent "to every bishop" to cause "all the altars to be taken down, and instead of them a table to be set up in some convenient part of the chancel." In Hooper's Visitation, begun within the year, this direction is added to words adopted from Bishop Ridley's Injunctions (Hooper, Later Writings, p. 128, P. S.).

There at once arose doubts—"great contests" (Burnet)—both as to whether the table was to be placed "lengthwise" or "crosswise," and also as to how the minister should stand.

"You could never be content in placing the same (table) now east, now west" was addressed to Ridley himself at his trial (Ridley, p. 281, P. S.). The ministers were sometimes ordered "to turn their faces towards the people" (Hooper, Visitation Art. 1551, p. 128, P. S.), *i.e.* possibly standing east of the table. So Hogarde, "How long were you learning to place the table. . . . The ministers being in contention on whether part to turn their faces, towards the west, the north or south. . . . Some would stand westward, some northward, some southward" (Hogarde, Displaying, &c. 1556, fo. 72 *b.*).

The tables were made longer in proportion than the altars of ordinary churches had been (see Prynne Quench-Coal or Brief Disquisition, p. 169), and the "convenient" part of the chancel, with its stalls and seats, seems to have been commonly thought

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to be near above the chancel steps in the larger churches. The word "set table-wise" appears used simply as equivalent to "length-wise" with the short ends east and west, "endlong, endwise above the steps" (Holy Table, Name and Thing, p. 45). Where chancels were small any removal must almost necessarily have been into the body of the Church, as Archbishop Parker and the bishops recognized in 1560 in the "Interpretation" of Queen Elizabeth's injunctions; and, not only in cases "where the choir seemeth to be too little," but also wherever the attendance was great, they sanctioned the placing of the table in the body of the Church before the door of the chancel for the actual service (Cardwell, D.A. I. 238; Strype, An. I. i. 320).

The substitution of the tables and their being set as might be "convenient" had necessarily destroyed the uniformity with which, when the rubric for "standing afore the midst of the altar" came out, the ministers had been expected to face eastwards.

This may be called the first period of doubtfulness between the actual place of the holy table and the real bearing of the rubric.

III. The state of things was recognized, and the several doubts were clearly resolved by directions given in King Edward's Second Book.

This directed in the first instance, that the "place of the Church, Chapel, or Chancel" "where morning and evening prayer should be used" was in case of "controversy" to "be referred to the ordinary," and that "he or his deputy should appoint the place." And next, instead of the former rubric of the Communion which directed the priest to "stand humbly afore the midst of the altar," it substituted two careful directions,—viz. that the table "shall stand in the body of the Church or in the chancel, where Morning Prayer and Evening Prayer be appointed to be said; and the priest standing at the north side of the table, shall say" the beginning of the Communion Service. Cosin was quite clear that "they agreed to set forth this rule instead of the former" on account of the "ado about the position of the table and the priests standing at it." (Works, vol. v., p. 458.)

That from this time the table stood generally "lengthwise" is

fairly established by the testimony of Bishop Williams, Lord Keeper from 1621 to 1626, who held that according to the rubric "the end was to be placed towards the east great window," observing that "this was not a new direction in the Queen's time only, but practised in King Edward's reign, and so used at this day in most places in England." And, speaking of course of the last seventy-five years, he stated that he "did not believe that ever the Communion Tables were (otherwise than by casualty) placed" altarwise "in country churches" (Holy Table, A.D. 1627–1637).

So the "Survey of the Book of Common Prayer" in 1610 states that in Queen Elizabeth's reign "the Communion Table stood always in the midst of the quire east and west."

With Bishop Williams, Archbishop Laud agrees in A.D. 1637 on this point, when he had just completed his metropolitical visitation of the dioceses in his province; allowing in the privy council according to the most natural interpretation of his words (Censure, Works vi., i. 59), that "since the reformation" the holy table "stood in most parish churches the other way"—*i.e.* not "at the upper end of the quire," and not "with the large or full side towards the people." So also in the "Canons" of 1640 (vii.) it is only asserted that the "altarwise" position "had continued in . . . *some* of the parish churches."

What the details of the practice had been in the meantime (and also how such "casualty" might produce exceptions) is made clear by Queen Elizabeth's injunction, 1559 (Sparrow, p. 84; Cardwell, D.A. i. 234). It says, "there seemeth no matter of great moment" whether the altar, replaced under Queen Mary (Bonner's Art. Things of the Church, v.; Poli Constt. ii.), be removed or not, "saving for an uniformity," and it orders that "no altar be taken down but by oversight of the curate . . . and the churchwardens . . . And that the holy table in every church be . . . set in the place where the altar stood . . . saving when the communion of the sacrament is to be distributed . . . at which time the same shall be so placed in good sort within the chancel" as to ensure convenience of hearing and convenience of communicating. This frequent moving of the tables according to ideas of convenience for each

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communion could scarcely end all local variety. And Dorman (Proof of Certain Articles, 1564, fo. 120 *b.*) describes probably truthfully the table "in the same church as placed in quire, in body, and altarwise in chancel, but removable for communion, and the minister as turned towards the south, and another while towards the north." There is no appearance here of either eastward or westward position for the minister, but of a table set east and west.

There is no ground for questioning that, up to and into the reign of Charles I. this was at any rate the common state of things, described as above by both Archbishop Laud and Bishop Williams.

Williams further states (as others do) that in cathedrals and colleges the table was retained altarwise; he does not object to its being so placed in them or in kings' and bishops' chapels, "where there are none to be scandalized," and accordingly he has it so placed in his own. Still even in cathedrals it had not been always so. At St. Paul's as soon as King Edward's second book came into use the table was brought down into "the lower quire where the priests sing," *i.e.* was set between the stalls (Stow Ann. 1552, p. 608). At Canterbury, in 1565, the table at communion time was set east and west (Certificate of Prebendaries to Archbishop's Commissary; Strype's Parker, ii. 26, vol. i. p. 365).

Canon 82 of 1604 ratified the status quo, but

IV. Towards the end of James I.'s and in Charles I.'s reign an inclination gained ground not to move the tables about and generally to regard them more reverently. No doubt in many places the east end had been found as "convenient" as any other situation.

The power of the ordinary had been slightly modified by the rubric of Elizabeth, which said that "morning and evening prayers were to be used in the *accustomed* place of the church, chapel, or chancel, *except* it shall be *otherwise* determined by the ordinary of the place," and where those prayers were said "the table" was still "to stand" by the rubric; only, by the injunction of the same year, "within the chancel."

Under all these circumstances some ordinaries apparently thought themselves justified by law in ordering the tables to be

kept always "altarwise" at the east end of the chancel, and did so (e.g., Kent's Visitation, 1631, Report of Ritual Commission, 2nd Rep. p. 527).

In A.D. 1633, in the important case, as it proved to be, of St. Gregory's-by-St. Paul's, their power was tried, and the question virtually determined. In that church the dean and chapter of St. Paul's, as ordinary, caused the communion table to be removed to the east end of the chancel and set altarwise. Five parishioners brought this before the Court of Arches "as against law." The dean and chapter applied direct to the privy council, which summoned the parishioners before it. The council decided that the liberty to place the communion table most suitably "and when, and for how long" was "not to be determined by any humorous person but to be determined by the ordinary." The King in Council confirmed the act of the ordinary, and ordered the Dean of Arches, if the St. Gregory case went on, to decide accordingly (Minute of Council, Nov. 3, 1633; Heylin Cypr. Anglic. p. ii., p. 244; Antid. p. 63; Rushworth, H.C. p. ii., p. 207).

This decision of the Privy Council, with the reference which it made to cathedral churches as the guide "was made the rule by which all other ordinaries did proceed in causing the communion table to be placed altarwise in the Churches of their several and respective dioceses" (Heylin Cypr. Anglic. p. ii. p. 243; see Prynne, Complete Hist., p. 87).

As an example, in 1637 the Calvinist Bishop Davenant of Salisbury inhibited the churchwardens and other parishioners of one of his parishes from "bringing down of the communion table or altering its place at such time as the holy supper is to be administered." He cited the Injunctions of Queen Elizabeth and the 82nd canon, on which the council relied (Bp. Davenant's letter to Aldbourne parish, note on Laud's Works, v., p. 61).

The setting, or rather the keeping, the table with ends north and south at the east of the chancel at once revived the rubrical question at what place the minister should stand to begin the service.

To stand at the end of an altarwise table seemed no compliance with the order to stand at the side of a table set lengthwise at

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the chancel steps, any more than to stand at the side of a table so placed was compliance with the order to "stand humbly afore the midst of the altar." To meet the earlier difficulty a rubric had been enacted.

As in 1549 an Order in Council for moving the table crossed the existing rubric, which had belonged to the place of the table east of the chancel, until the inconsistency was cured by a new rubric in 1552, so had a second Order in Council, in 1633, for moving the table back again, crossed that new rubric which had belonged to the lengthwise position of the table, and was still in force. But in this case no alteration of the rubric was made to remedy the inconsistency.

Only it is clear that an Order in Council giving leave to move the tables had no force to change the legal sense of a statutable term in a rubric. The Order itself took no notice of the term.

A condition of doubtfulness, of disaccord between the rubric and the position of the table, had a second time been introduced.

(1) The Puritan Clergy had maintained that, in this position of the table, the rubric could not be obeyed, and they used this as their capital argument against the change—viz. that the north end was not "the north side," and that the minister standing at the north end no more complied with the rubric than if he stood anywhere else.

In 1630 Smart's Instructions for Articles to be exhibited to the High Commissioners shortly embody this constant contention. "This altar . . . is placed at the end of the quire along by the wall, with neither side toward the north. . . . The Book of Common Prayer &c. command . . . that the minister should stand at the north side of the table, which cannot now be done when neither side of the table standeth northward." So also in his Durham sermon, 1628, "There are but two sides of a long table and two ends."

Williams, Bishop of Lincoln, the late Lord Keeper, had in his Grantham order of 1627 enjoined that "This table is not to stand altar-wise and you at the north-end thereof, but table-wise, and you must officiate at the north-side of the same, by the liturgy."

In 1636 Bishop Williams republished his own order, and in 1637, four years after the Order in Council, met remonstrances with a dissertation (Holy Table, Name and Thing). He had gone so far against the Order in Council as to rail in the tables without moving them eastward (his "half compliance," as it was called). He kept them lengthwise and kept the minister to "the long side."

In the same year 1637 Prynne maintained in his "Brief Disquisition" (Quench Coal) that the table ought to stand far from the east wall, but assuming that it does stand against it, still that it must have "the east end of it next to the east wall" (p. 174); and that the minister must then in any case stand at "the long side;" that this is as clear a direction as any. "The rubric clearly determines that the table ought to be situated with the sides or longest squares of it north and south . . . and being a long square not a perfect quadratum hath but two sides and two ends; the narrowest square of it being ever in our English tongue termed an end not a side, and the longest square only a side. . . . North side must needs be interpreted long-side, not the narrowest square set northward."

This later condition of doubtfulness has a more secondary aspect, because these arguments of the Puritans had originated no doubt in the opposition to moving the table at all. But it cannot be said that they were mere ad captandum arguments. They were seriously continued. Prynne's argument and Bishop Williams's reasoning, action and direction shew that it was held that the rubric as to the minister's position could not be obeyed unless the table, though moved eastward, were still set lengthwise. If this plan had been followed the rubric might still have been obeyed to the letter, and yet the sense it was conceived in would have been no less given up, which was that the Communion might be celebrated as near, as much among, and as familiarly with the congregation as possible.

(2) Still Bishop Ridley's original change confirmed by the royal letter of November, 1551, and implicitly by the second book, after serving as it did to restore the idea of "communion" as against the late "propitiatory" or "satisfactory" and "private" usages, had not, with all the modifications that had

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been tried for eighty years, been found really "convenient" to the shape and structure of the churches. It was also complained of as admitting of much irreverence. Thus in 1631 the Archdeacon of Sudbury asks, Is it "placed in such convenient sort as that the minister may be best heard in his prayer and administration, and that the greater number may communicate? To that end doth it ordinarily stand up at the east end of the chancel, where the altar in former times stood; the ends thereof being placed north and south? Is it at any time used unreverently by leaning or sitting on it, laying hats upon it, &c.?" After 1633 such questions, pressing the removal, became of course common. When the decision of the Privy Council in that year sanctioned universally the reverting to the antient place of the holy table the change to that place was pushed on.

The higher churchmen were much pressed by the argument from the rubric at least to set the table "endwise," if they moved it to the east end of the chancel, and thus to enable the minister still to officiate according to the rubric at "the north side," and they met the argument by officiating at the "north end" as the north side.

There is little argument in favour of this to be found in their treatises (See Heylin, Coal from Altar, 23; Antid. Linc. 45, 58, whom Bennett, p. 154 and Elborow, p. 98, only repeat). For though it might be said "every quadrilateral has quatuor latera," that is four sides, yet in common English (as was constantly answered at the time) the plain and usual way in referring to an oblong, is to speak of its two sides and two ends.

Without much defence of the position, the movers simply placed themselves at the north end. In this Laud followed the usage of Andrewes (Andrewes, Minor Works, xi., p. 150; Prynne, Comp. Hist. 121), and Wren and Juxon followed their patron. It was a new way of complying with the letter of the rubric without putting the table endwise, when the original purpose and spirit of the rubric was departed from in the removal of the table. It was not properly an evasion. It was one solution of a question raised by a general change which the Privy Council had introduced. It was the high church form of complying

with a Puritan rubric in order to meet a Puritan objection, and was not felt by the Puritans to meet it at all. It was not a contemporaneous interpretation of the true meaning of the rubric, but a late adaptation to meet a new difficulty. It was one answer to an indeterminate problem. Plainly it was not the only possible one, and it was not made authoritative.

(3) The doubtfulness, however, which was produced, presently took an acute form.

Bishop Wren was in 1640 accused by the Commons among other things, for "kneeling and consecrating at the west side of the holy table" (Rep. Committee, Dec. 19th, 1640; Wren's Parentalia, p. 12); and one of the articles of impeachment brought before the Lords 5th July, 1641, against him, is for "consecrating with his face towards the east" (Wren, Par. pp. 14, 103; Rushworth, Pt. III. v. 1, p. 354).

Dean Cosin, in March, 1641, was impeached, among other offences, for having been (Article 2, Rushworth, 1640, III., i. p. 208) "used to officiate at the west side thereof, turning his back to the people" (Cosin, Cal. State Papers Dom. 1640, p. 289).

Both answered that they did so at part of the service only,—the consecration prayer, and Cosin adds "as others did before him" (Lords' Journals, May 24, 1642). But even this, it must be remembered, was at that time indefensible by the letter of the rubric: there was as yet no rubric admitting of the consecration prayer being used "before the table." The only rubric which then touched the position of the minister directed him to stand at the north side.

(4) There are also sufficient later indications that others of the clergy did not adopt this second plan of moving forwards and back again, but stood at the west front, commonly perhaps at the north part of it, and took care that the congregations should see the breaking of the bread. These indications will be referred to again.

The practice was not uniform. No rule was made. The ministers at large in the absence of direction, were not bound to follow the general working solution of the high-churchmen of the day who had brought back the difficulty, as if it were the

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only solution. Few would accept the compromise of placing the table "end-wise at the east." Yet not only Puritans who maintained that "end was not side," but every clergyman in his own church had to consider how he could best obey a rubric bidding him stand at the north side of a table whose sides had now been turned east and west.

At the Savoy conference, when the rubrics of the Communion Service were under discussion, the Presbyterian divines suggested that "the minister turning himself to the people is most convenient throughout the whole ministration," as he was directed to do at the absolution (Cardw. Conf. p. 320). The bishops disagreed with this, and answered that while "When he speaks to them, as in lessons, absolution and benedictions," it is "convenient that he turn to them," yet "When he speaks for them to God it is fit that they should all" (both minister and people) "turn another way as the ancient church ever did" (ibid. p. 353). This contemplates on the part of the minister the same eastward-looking as the congregation ordinarily used, and indicates that at least a majority of the bishops were in favour of it. Certainly they cannot have considered the compromise which had substituted the north end for the north side to be the essential and only way of carrying out, after the place of the table was changed, the spirit of the rubric, which was to make the service an open and congregational service.

No change was made in the rubrics as to the minister's position, except in that before the consecration. If it is asked why a new rubric was not framed to settle any new doubt, as the former doubt had been met in 1549? why the old rubric was retained? it is clear that the bishops wishing the prayers to be said eastward, and the divines westward, it was impossible to frame a new one. To remove the old one might have disembarrassed one party, but the Puritans, while they held it to be inapplicable to the new position of the table, could not be expected to sacrifice a direction which was their main argument against that position, and seemed to justify many in keeping (as undoubtedly they did) the table still westward and lengthwise. But while change of direction could not be acquiesced in, diversity of practice was fast losing significance.

Thus while the first removal of the holy tables had caused a controversy as to the place of the minister, determined for a time by the rubric of the second book, the second complication caused by their replacement, remained undetermined.

Both sections whose difference of view expressed itself so distinctly at the Savoy continued to have their representatives in the Church.

The Court then has now to consider the evidence before it as to the period after the conference and the 1662 revision, in order to ascertain how the retained rubric was worked and understood. This material, in the absence of any enactment or judicial decision, is limited to any records of the course pursued by the ordinaries, of criticisms by commentators, and of any parallel illustrations.

The Court has had a list made of notices and engravings which were produced at the hearing, and of others of the same character; others may of course remain unobserved, and the conclusions to be drawn from such unknown sources may vary from that which now commends itself; but known sources yield an intelligible idea of the usages.

(i.) As regards the course followed by the ordinaries:—At an earlier date, viz. in 1627 (1), Cosin, Archdeacon of the East Riding, had enquired in his draft visitation articles (Works, vol. ii., p. 3) whether "the communion table was placed according to the injunctions" (of Q. Elizabeth), and whether it was "not at any time abused by sitting or leaning upon it, by throwing hats on it, writing on it, &c. . . ." (Art. 3), and had further enquired whether the minister "when he readeth the second [the Communion] Service . . . doth leave his former and ordinary seat or pulpit, and go unto the north side of the Holy Communion table, and standing there begin with the Lord's Prayer, &c., according to the form prescribed until the sermon time, and if there be no sermon until the end of the service" (Art. 7).

(1) Reported in 1687 in Brooke's Six Cases, Hebbert and Purchas, p. 198, and in Law Reports 3 P. C. p. 663; as 1689 in Guardian Report, Feb. 12, 1890, p. 255*a*. The date is of consequence because Cosin's questions, Arts. 7 and 9, refer to the Tables when placed according to Qu. Eliz. Injunctions (Art. 3, Works ii. p. 4). before the Privy Council Order of 1633.

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Articles differently worded, to the same purport, are proposed in his other, fuller, unfinished draft (Cosin, Corresp., vol. i., Surtees 52, p. 106).

The date, 1627, six years before the change of the place of the table, the reference to the injunctions, and other points shew that Cosin refers to the north side of tables not yet replaced "altarwise."

In 1640 Juxon, Bishop of London, in his visitation of that year first published, and, so far as we know, is the only ordinary who used certain articles stated to have been "compiled by the Bps. and Clergy in Convocation, anno 1640," in accordance with "canons" made that year. "Concerning parishioners," (9) he asks whether all who intend to communicate "draw near" or keep their places, when "called" by "the minister standing as he is appointed at the north side or end of the table when he prepares to celebrate the Holy Communion." (Ritual Comm. Rep. 2, pp. 589 a, 592 b).

This question belongs to a time when no doubt many tables had been replaced, though very far from all, and it treats the "north side" as "end," and as the celebrant's place. There cannot be much doubt that it was (as has been said) the usual high-church manner of adapting the rubric to the "altarwise" table.

Whether it was the only manner can obviously receive no further light from visitation articles until after the Restoration.

But after the Savoy Conference in 1661, when the bishops had, in answer to the Puritan divines, pronounced as to the position of the minister in the prayers of the Communion Service, that "when he speaks for them to God, it is fit that they should all (minister and people) turn another way—i.e., he not to face them, but to look the same way as they ordinarily did, namely eastward; after this very distinct resolution, although no alteration of the rubric was (or could possibly be) made in 1662, yet all the visitation articles of 1662 (which otherwise follow up the same and same kind of enquiries as Juxon's of 1640 or Cosin's of 1627), omit any reference to the north side or end, save that Pory, Archdeacon of Middlesex, re-issued verbatim Bp. Juxon's, in which it is specified. "The minister standing as he is ap-

pointed (in marg. rubr.) at the north side or end of the table when he prepares to celebrate the Holy Communion, and calling, on those who intend to communicate, to draw near . . ." (ibid. p. 629).

We have extant no less than eighteen sets of articles exhibited by bishops and six by archdeacons in visitations in 1662 (Rit. Comm. Rep. 2, App. E).

Not one of these twenty-four, except Pory's, refers to the minister's proper place as being at the north side or end.

Pory's articles have been sometimes accepted as evidence that the authorities understood the rubric as to "north side" to require all ministers to stand at the north end. But in contrast to the other twenty-three ordinaries they cannot be so accepted. And if the careful reference to the prescribed position of the minister implies, as it seems to imply, that there were still, in 1640 and 1662, ministers who, as in 1627, did not stand at the north end, the silence of the other ordinaries was not due to an existing uniformity.

It appears, however, not to have been hitherto observed that in his printed articles as revised for his next visitation (166[5] Brit. Mus.) Archdeacon Pory, whose query in 1662 had "standing as he is appointed (in marg. rubric) at the north side or end of the table" now omits the words "or end."

We find, then, that Bishop Juxon's articles, which the bishops agreed to in 1640, required the minister to stand at the "north side or end," but that the next sets of articles in 1662, with one exception, omit such requirement.

It is asked whether this general change admits of explanation, we may remember that the bishops in the Savoy Conference had just recorded their desire that the minister and people should all turn one way, which was eastward: that the question put in 1640 was, like Cosin's in 1627, really still under the influence of the tradition of the lengthwise position in which the table stood under the injunctions of Queen Elizabeth; inasmuch as in 1640 the replacement, with whatever sentiment attended it, had not long begun, but in 1662 had much extended itself. Neither must the influence be forgotten of the Lutheran churches of the continent among which the eastward position was, and is to this

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day, in use. Much, however, must be ascribed to the influence of Bishop Cosin (called by the historian Fuller "the Atlas of the protestant religion"), who presented the new draft of visitation articles to the president in convocation in 1662 on the part of a committee appointed to draw them (Cardwell, Sym., pp. 647, 666).

Whether these or other reasons appear or not to illustrate the fact, the fact remains that, contemporaneously with the last revision of the Prayer Book, the requirement of the north side or end in the articles and injunctions of the ordinaries ceased, and, so far as the Court is aware, never reappears.

(ii.) As regards criticism by commentators:—A popular and serviceable catechism after the Restoration, which has been ascribed to Bishop Gauden, had assigned as a reason for the place at the north end that it was "to avoid the popish superstition of standing towards the east" (Ἐνιαυτός, 1664; p. 300, ed. 2). Nicholls repeated this reason for "the usual place of saying the Communion Service with us," viz., the "north side," in his Commentary on the Common Prayer (note (p.) on Communion Service, ed. 2, 1712); and for the same reason urged that the Consecration Prayer should be said "kneeling." Wheatly, in his Introduction to the Common Prayer (ed. 1710, 1714), made the strong statement that the position was "enjoined for no other end but to avoid the practice of the Romish Church." But in his third (1720) edition, he withdrew this argument. Even Ridley, in his original list (Works, P.S., 319) of fourteen points in which "the popish mass" was not to be "counterfeited," made no reference to the position of the priest. The change from the eastward to another position had been simply consequential on other changes.

Wheatly, however, proceeds to allege in support of the north side position a reference to Bishop Beveridge as having "shewn that wherever in the antient liturgies the minister is directed to stand *before* the altar, the north side of it is always meant.—Bev. Pandect., vol. ii., p. 76. § 15. See also Renaudot's Liturgies, tom. ii., p. 24." The passage of Beveridge is in the Annotations, vol. ii. (three paginations), and bears no such meaning. Beveridge simply shews that the *right hand* of the

altar, the bishop being in the apse behind, meant the *north side*, and that the clergy made their reverence before it, entering from the north. The passage of Renaudot (p. 24; add 21 and 26) is equally remote from any bearing on the question.

Comber, and Shepherd, in their important treatises say nothing on the point.

The authority of Nicholls, and still more of Wheatly, contributed to good order, as well as to the promotion of investigation. Their opinion, given without acrimony, lent force to that sense of "north side," which had already the advantage of apparent literal plainness, and they had influence in reducing lingering diversities to uniformity. Yet there is no doubt that their unhistorical idea of a protest against Rome and the false view Wheatly took of his two authorities guided their judgments in favour of standing at the north end. But though their reasons are fallacious their value as witnesses is unimpaired.

The north end became the generally used position, and is beyond question a true liturgical use in the Church of England, formed as primitive uses were formed, not by enactment, but, as the word itself implies, by use.

(iii.) It is at this point that there comes in such illustration as we can command of the actual usages or conditions during the same period.

The evidence of engravings not made with a direct eye to the point in question is somewhat difficult to estimate justly. The testimony of each by itself might be of little value, and some may be rude and incidental in character. Their chief value, therefore, would depend on their concurrence and continuity. It is, however, impossible to neglect their evidence such as it is. For it ought to be observed, that there is no suspicion of the plates herein referred to having been published to serve a purpose; that if there were bias in one direction there would certainly be bias in the other; that the treatment is generally prosaic; drawings which are merely picturesque or emblematic being readily discriminated; that there exists no reason to impute to the draughtsmen that they represented what they never or rarely saw. This evidence would claim, therefore, to be fairly considered if the prints were but stray prints. But more

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so when the character and position of the authors and editors of the books in which some of them appear is regarded. Within the century onward from the Savoy Conference we have engravings in which sometimes the celebrant is shewn in the discharge of his office; and more in which the Holy Table is seen prepared for the Communion, and the celebrant's place indicated by the book placed for him, while the litany is being said from another book at a fald-stool in the body of the church. In that case, the book on the table is generally open ready for the priest to proceed thither as celebrant to begin the Communion. In other cases the communion book is shut. Among these engravings must be distinguished mere reproductions of former engravings, and such as are re-drawn with some careful difference. This inquiry is somewhat tedious, but the impression formed upon a résumé of the facts cannot be produced by a general sentence about them.

(*a*) In support of the north-end position it is not necessary to cite many instances because the prevalence is beyond doubt. But the following are important drawings on account of the authority of the writer of the book.

The north end is distinctly indicated:—

In 1676 in the plate prefixed to Part II. of Dean Comber's (of Gloucester) work, The Companion to the Temple: or in the same plate in Herne's Domus Carthusiana, 1677.

In 1683, The Title of Burnet's Reformation, Part II., is not an actual scene, but it would not be even conventional if it did not represent a real position. The celebrant stands at the north end; another book closed is set on a desk at the edge of the table in the middle eastward.

In 1686, the north end use is indicated, Gunton's Interior of Peterborough Cathedral—intended to shew it as it was in 1643.

In 1736, Picart's fine plate, Communion of the Anglicans, in the Amsterdam edition, and in 1737, in the London edition, shew the same position distinctly in St. Paul's Cathedral—a change perhaps since 1681 (De Laune, infr.).

It may be noticed that one of Sandford's large plates of the coronation of James II., 1687, marks both places as intended to be used.

(*b*) In illustration of the celebrant's position being thus indicated as before the table, eastward or (occasionally) partly eastward the following belong to the same period—the century after the Savoy Conference.

The book is laid open eastward in a plate by Hollar, in Sparrow's Rationale of the Common Prayer, in 1657, repeated in the 2nd edition in 1661; again, in 1664, when Dr. Sparrow was President of Queen's College, Cambridge; again, in an edition after he became in 1667 Bishop of Exeter; in two more, after he was Bishop of Norwich, from 1676; after his death in two more editions, 1704 and 1717. The 1668 and later editions have a new engraving, by a new artist, but the same representation.

In 1660 came out the 2nd, and in 1663 the 3rd edition of Scintilla Altaris, by Dr. Edward Sparke, chaplain to the King: in 1666 the 4th edition, with a new engraving, and three others by 1682. These all have the same Hollar type before them with variations of detail shewing attention to treatment.

In 1674, the Folio Prayer Book by the King's printer has a large copper engraving, Domus Orationis; the book laid nearly east. In 1693 the same reappears.

In 1675, a Prayer Book, printed by the King's printers, has an engraving copied after Hollar.

In 1681 De Laune's Present State of London has a plate of the interior of St. Paul's: the celebrant's book closed is laid for the eastward position at the north part of the front; the epistoler's diagonally at the "epistle corner" (Chambers, p. 286).

In 1686, 1696, 1700, 1724, The Divine Banquet, of which there were four editions in forty years, bears Bishop Compton's (of London) imprimatur, and shews the celebrant kneeling at the north of the front facing towards the centre; not consecrating.

In 1697 was published the 14th edition, in 1743 the 19th edition of the Book for Beginners. The celebrant stands somewhat to the front (not the end) of the table at its northern part, turned rather to the east and centre of the table. The time is after communicants have "drawn near" and before consecration prayer. This book is by Bishop Patrick, who was Dean of Peterborough in 1679, Bishop of Chichester in 1689, and Bishop of Ely in 1691.

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In 1698, Dean Brough, of Gloucester, borrows De Laune's (1681) drawing for his Holidays of the Church.

In 1709, a Prayer Book by the King's printers has a new treatment of Hollar's subject, not at all like Hollar, with the same indications.

In 1728, Dr. Thomas Burnet's (Master of Charterhouse) State of the Dead (ed. Earbery) has a drawing inscribed as painted at the altar ("pinxit ad Alt [are]") by Fuller, of the chapel of Magdalen College, Oxford; the two books closed are laid eastward, at north and south parts of the front, and the table is spread with a white cloth for the Communion, and is so draped that kneeling at the ends would not be possible (Chambers, p. 290).

In 1774, an Oxford Prayer Book has a new engraving after Hollar, with other variations.

In the above list no mention is made of the 1700 edition of Sparke, or the Prayer Book of 1684, because the representation is of the Litany being said at the altar—a known use; nor of the Whole Duty of Receiving Worthily, 1717, because the time chosen is after the consecration prayer.

In books thus issued at intervals throughout a century by royal printers, or under the direction of leading divines of different schools, in pictures of churches, and of historical events, there seem to be six or seven typical representations (besides those of coronations), repeated in many editions, which mark the minister's place before the table. It seems scarcely possible that these could have been all published and republished as they were, unless such position, as well as the north-end position, had been so continued that they represented no unknown manner of arrangement and celebrating.

But it is still more important to observe that among the editors and authors are persons of such character as Bishop Sparrow, Bishop Patrick, Dr. Sparke, Dr. Thomas Burnet, and others, who would scarcely have tolerated the appearance and frequent repetition in their own books of such representations, if it had been understood that the form of divine service uniformly portrayed or indicated in them was an illegal form.

Further than this, the book Ἐνιαυτός, 1664 and 1674, attributed (as has been observed) to Bishop Gauden, should be

mentioned here; in which one plate represents the lengthwise position of the table east and west, with the two ministers standing respectively on the long north and south sides of it, and another plate indicates the position looking eastward, which appears in Dr. Sparke's book. There seems to be here a simple effective evidence of contemporaneous diversity living and tolerated.

Instances, then, of the position looking eastward, and commonly while standing at the northern part of the table, cannot in the century which followed the last revision of our Prayer Book, be in justice called exceptional. Even if they had been so, while it is true that exceptional cases prove nothing against a rule, yet where a rule is ambiguous, or where there are two ways of approximately observing it, or where it cannot be obeyed to the letter, in the true meaning of the letter, exceptional cases are good evidence of diversity existing in practice.

When the original intent of the rubric was departed from by the tables being moved eastward, it seems that ministers who officiated before the table still held to the letter of the rubric by standing towards the north part; although they were too near the times to suppose that this position had been contemplated when the rubric was framed.

To sum up the inquiry so far:—

A large section of the Church strenuously argued against the north end, even when sanctioned and widely adopted, as not fulfilling the conditions of the north side.

The Church authorities at the Savoy Conference favoured an eastward position and put the fact on record. The ordinaries never afterwards (so far as is known) required the north end to be taken, except one who apparently implies that it was not always taken. There are illustrations of the fact that an eastward position of the celebrant standing at the north part was no unfamiliar one. Against this is to be set the authority of Wheatly and Nicholls—proof abundant, were proof deficient, of the "usual" position, but not (even apart from the erroneous defences they set up) tending to prove the sole legality of the position they advocate, and the illegality of the other.

Two other interpretations placed upon this rubric may now be

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noticed; the second of them being that which is advanced for the defence.

(*a*) It has been pointed out that the only parts of the service to which the "north side" direction strictly applies are the two opening prayers and the collects for the Queen and for the day: that the commandments, Scriptures and versicles are differently assigned; that the consecration prayer, and by custom the creed may be said eastward: that the minister necessarily stands eastward in presenting the alms and oblations, and is not after that directed to be again at the north side.

It has been argued therefore that the direction of the rubric cannot be with certainty extended beyond the four prayers to which it primarily applies, and that within those limits to obey it ought to be irksome to no one whatever his predilections.

It must be remembered that even within those limits its enforcement would be an enforcement not of the original rubric as it stands, but of a later tacit interpretation put upon it under changed circumstances, and not universally adopted.

(*b*) The Lord Bishop, the defendant in this case, has adopted another alternative not only not unknown to the past, but as has been seen, indicated or figured in books which, edition after edition, were in the hands of numbers of Church people, and never prohibited or censured by ordinaries, or by any judicial decision for two centuries since the last revision. He has applied "north side of the table" in regard of a person standing "in front of it" to "the northern part" of the front (Resp. Plea 10). This can be regarded only as an accommodation of the letter of the rubric to the present position of the table. To stand at the north end was a far more general and accepted course. It had the advantage of presenting itself as a *literal* compliance, and did and probably always will commend itself to many for that reason, although it was not the original literal sense, not the one necessary interpretation, never pronounced by authority to be such, and for a long period not exclusively in use.

Arguments nevertheless, which attempt to show in the words of the responsive plea of the Lord Bishop that "the northern part of the front" is "the north side of the table as directed by the rubric," if that means that the rubric was intended to enjoin

that particular position, are held by the Court to be inconsistent with the continuous history of the rubric. It is not possible to build upon the Latin use of the word latus, or of foreign words derived from it, as meaning a part of the front. The term used to define that part of the front side is actually "end" in old English rubrics and writers on these points. Instances may be seen in Longford, temp. Hen. VIII., ap. Simmons' Lay Folks' Mass Book, 179, in Consecration Service, ap. Maskell, ii. 309, about A.D. 1500, and in Thomas Becon, temp. Eliz. iii. 264 P.S. Neither to Heylin, nor Bishop Williams, nor Wren, nor Cosin in explaining "north side" did it occur to find it in the west front. If the lawfulness of the position depended on that plea it must fail. But the legality of an action does not rest on a plea set up for it, but on all the facts within the cognizance of the Court. Historical facts supply the only material known to the Court from which a just account can be formed of the meaning of the term which is the present subject of charge. Those facts which are available and are to the point have now been stated.

But before the Court defines its judgment one argument advanced against the place taken by the Lord Bishop at the holy table requires particular notice.

It was strongly pressed that the "eastward position" has a special significance which at once makes the position itself important and condemns it.

The eastward position is, it was said, a sacrificial position—"the natural attitude for one offering a sacrifice"—and conveys some sacrificial doctrine of the Eucharist against the doctrine of the English Church. There may be ill-informed recent maintainers of this position as essential, who may be found to have alleged something of the kind. If it were true it would apply more strongly by far to the consecration prayer, where such position is admitted to be lawful, than to the beginning of the service. But by whomsoever put forward the statement is, in both cases, without foundation. Neither those who approve nor those who disapprove of an action which is recognised by authority can really invest it with any sense contrary to the sense of the authority which recognises. No significance can be attached to a form, act or usage unless that significance is in

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accordance with the regular and established meaning of language or symbol whether liturgical or other. It is not admissible that any allowable usage should be suddenly either proclaimed or denounced as teaching something which it was never supposed to teach before.

A place at the west side of the holy table has not in the past been invested with sacrificial character. Many divines who have taught what is called the "highest" doctrine of sacrifice in connection with the Eucharist tenable in the Church of England have habitually celebrated at the north end, and many who have used the eastward position have done so with no thought that they were teaching any doctrine by it, or that any doctrine could be either deduced from or expressed by the place they took.

The quarter designated by Scripture for the laying the hand upon, and shedding the blood of "the offering" was a different one. It lay "on the side of the altar toward the north." The "most ordinary and universal slaughter of the sacrifices was" the space "northward from the altar." (Lev. i. 11. See Lightfoot, Prospect of Temple, xxxv.)

The imputed sacrificial aspect of the eastward position is new and forced, and can take no effect in rendering that position either desirable on the one side or illegal on the other.

The Court concludes.

The term north side was introduced into a rubric of the Liturgy to meet doubts which had arisen owing to a general change in the position of the holy tables. It was at that time perfectly definite and distinct in its meaning and application.

About eighty years after the first publication of that rubric a second general change was made under authority in the position of the tables, which were now moved to the east end.

This change made the north side direction impossible of fulfilment in the sense originally intended. The new interpretation or usage commonly adopted was not prescribed by any statute or authoritative declaration. The evidence of the visitation articles has been already adduced, and it has been shewn that the grounds which the liturgical commentators took in its defence were mistaken. On the other hand there are indications that a

different interpretation, though probably small in its range, was not unfamiliar in the Church.

It will be observed that the argument under this head is of a cumulative character, and that no point of the evidence is conclusive when isolated. It is the concurrence and coincidence of such indications as have been referred to that gives them force. It is possible that further research or argument may hereafter throw additional and perhaps novel light upon this somewhat obscure subject, devoid as it is of doctrinal interest.

So far then as the information before the Court extends, the Court is of opinion that a certain liberty in the application of the term existed—a liberty exercised not without consideration. This liberty was less and less exercised for a long time, but it does not appear to be lost by that fact or taken away.

Such existing liberty it is not the function of a Court, but only of legislation, to curtail. And the duty of the Court is not to consider one word only as it stands, but to have regard both to the original meaning and to the history of the term.

It would be virtually attempting to make a new rubric if it were judicially to attach a secondary meaning, whencesoever derived or inferred, to the definite, primary term, and to declare, under penal consequences, that what has never been set forth as the only possible form of obedience to the rubric, under present conditions, is alone admissible.

The Court is, however, distinctly called upon to state—the point having been urged with a view to guiding its judgment—that none of the alternative positions which have been mentioned as adopted by different authorities in accommodating this rubric to the present situation of the holy table convey any intrinsic error or erroneous shade of doctrine.

In order to make the act described an illegal act it would be necessary to prove that no interpretation or accommodation of the term "north side" except "north end" was correct in point of language, and that the position at the north end had been required by at least some authority since the last revision, and that no other had been practically permitted. This is not proved.

It is necessary therefore that the charge, presumably intended

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to be brought against the Lord Bishop in the ninth article, should be dismissed, although not on the ground alleged in the responsive plea.

5. *Breaking of the Bread "before the People."*

The charge contained in the 5th and 10th articles is that the Lord Bishop "stood whilst reading the prayer of consecration . . . . on the west side of the holy table, with his face to the east, and between the people and the holy table, and with his back to the people in such wise that the communicants present, being then conveniently placed for receiving the Holy Sacrament, could not, when he broke the bread and took the cup into his hands, see him break the bread and take the cup into his hands according to the directions contained in the rubric immediately before the prayer of consecration."

It is not charged as illegal that he stood in what is called the eastward position, but that he stood there "in such wise" that the manual acts were not visible to the conveniently placed communicants.

The responsive plea of the Lord Bishop is that "whilst reading the prayer of consecration he stood with his face to the east between the people and the holy table and before the people, but he had no wish or *intention to prevent* the communicants present from seeing him break the bread and take the cup into his hand."

By this plea the Lord Bishop seems to make reference to the judgment of the Privy Council in the case of *Ridsdale* v. *Clifton* (1), which was that a minister looking towards the east during this prayer must stand so that he may in good faith enable the communicants present to see the breaking of the bread, &c. "He must not interpose his body so as *intentionally* to . . . . *prevent* that result."

The evidence did not establish the fact that the communicants were then conveniently placed for receiving, but it was not asserted on the other side that if so placed they could have seen the acts.

The rubric says the minister is to "break the bread before the

(1) 2 P. D. 343.

people." The responsive plea only asserts that the bishop "stood before the people," which seems to be a necessary fact, but not necessarily a compliance with the rubric.

The plea does not deny that the manual acts were hidden from the people, but only that they were hidden "intentionally." The defence rests in fact not on the rubric having been obeyed, but upon the interpretation not having been mentally disobeyed—an allegation which the Court is not able to question.

It is, therefore, the part of the Court to satisfy itself—

1. Whether the order of the Holy Communion requires that the manual acts should be visible.

2. Whether, supposing the order so to require, the hiding of the acts without the wish and intention to hide them, constitutes a transgression of the order.

1. Does the order of the Holy Communion require that the manual acts should be visible?

In the first place, it is observable that, taken literally as it stands, the rubric applies the actual expression "before the people" to only one of the manual acts prescribed, which are five. The words are, "that he may break the bread before the people and take the cup into his hand." It is now made a direct article in the charge that the people ought to be able "to see him break the bread and take the cup into his hands."

A preliminary question, therefore, in order to a correct decision is: Can a satisfactory explanation be given of this attachment of such important words as "before the people" to only one act, that of breaking the bread—considering especially that these words were inserted at the same revision in which the rubrics prescribing the manual acts were added?

The facts about the phrase are these: At the Savoy Conference the Puritan divines urged that the manner of consecrating should be made more "explicit and distinct," and that the breaking of bread should be mentioned (Cardwell, Conf. 321). Bishop Cosin had "suggested" the same "correction" on the same grounds (Works, v. 516). The divines at the same time submitted a draft liturgy (London, 1661; Hall's Reliq. Liturg. iv. 1847) in which, after the consecration has been

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completed and declared so to be, and after another prayer, the minister is directed "to take" and "to break the bread in the sight of the people," "to take" and to "pour out the wine in the sight of the congregation," and, after another prayer, to deliver to them the elements. Such breaking of the bread at an interval after the consecration was the universal pre-Reformation use, was accepted in Edward VI.'s communion order, and had probably been used in many places up till 1662.

Assenting to the request of the divines the revisers re-inserted and enlarged the marginal rubrics touching manual acts, omitted since King Edward's First Book (which book the Puritan divines in their next "Exception," cite in favour of another change), and they prefixed to the consecration prayer the present rubric.

They did not, however, take the very words of the divines "in the sight of," but Bishop Cosin's word, "before the people."

Whether this was meant to be an exact equivalent and to place the very action of breaking before their eyes cannot be settled without taking into consideration a controversy of the time on which no less stress was laid and which either phrase would equally dispose of.

The Puritans had long reprehended a practice, which they attributed to both Lutherans and Anglicans, of cutting the bread into small pieces before the service—not a "prior consecration," but a prior breaking. They, no doubt, considered this an approach to the use of separate wafers for each communicant. Thus Calderwood, A.D. 1620 (A Defence of Our Arguments, p. 16, &c.), says, "that the sacramental breaking after thanksgiving is not enjoined, so far as we can find in their service books . . . . that the Lutheran Churches have it not, but have the bread cut in small pieces before it be brought to the hands of the minister, which is not that sacramental breaking instituted by Christ,"—and (The Pastor and the Prelate, A.D. 1628, ed. Edin. 1843, p. 5), "The prelate" (i.e. Episcopal Church) "hath turned . . . . the sacramental breaking into a preparative carving before the action." Accordingly, each of the Puritan liturgies—the "Middleburgh," or Cartwright's (1586-1602), The Settled Order (1644), and The Directory (1644-6), as well as Baxter's of 1661, presented to

the Savoy Conference—while they prescribe no other manual act, prescribe the breaking of the bread to be done in the course of the service.

It is perhaps on this account that the words "before the people" stand attached to only one act, not extended even to the taking of the cup, which is of no less moment.

With all these facts before them, not previously weighed, the Court cannot consider it absolutely demonstrated that the words "before the people," limited as they are grammatically to that action the doing of which away from the presence of the people had been so properly obnoxious to the Puritan divines who received the ready assent of the bishops to their introduction, can of necessity only mean that the people must have the fraction before their eyes.

But even if it be thus admitted that the expression itself may not be proved to have been intended to bear that sense only, the Court entertains no doubt of what the order requires. We do not doubt that upon wider considerations and far more important principles the minister, wherever he stands during the prayer of consecration, is bound to take care that the manual acts should not by his position be rendered invisible to the bulk of the communicants.

There is no doubt that at the time of the insertion of this rubric the manual acts were so visible. The tables were still often placed close to and among the people. When they were at the east end the learned prelates who had desired them to be so placed did not hide the acts. Bishop Andrewes and Archbishop Laud celebrated at the north end, though the latter defended the freedom allowed by the Scottish rubric. Bishop Cosin, when accused of officiating at the west side, replies that only the size of the altar had at times compelled him to consecrate in that position, but that he had not done so for twelve years (Calend. State Papers Dom. 1640, p. 289). Bishop Wren (Parentalia, 103), says that "the bread and wine were placed openly before him," which can only mean "openly" in relation to the congregation, as in any case they must be openly before the celebrant; and he proceeds to contrast his whole practice with that of "the Romish priests."

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No change as to this openness has been ever recommended, nor does the lack of openness necessarily follow upon the use of the eastward position. The tenor of the Common Prayer is openness. The work of its framers was to bring out and recover the worship of the Christian congregation, and specially to replace the Eucharist in its character as the communion of the whole Body of Christ. By the use of the mother-tongue, by the audibleness of every prayer, by the priest's prayers being made identical with the prayers of the congregation, by the part of the clerks being taken by the people, by the removal of the invisible and inaudible ceremonial, the English Church, as one of her special works in the history of the Catholic Church, restored the ancient share and right of the people in divine service. Both parties of the Church before the last revision required that the prescription of the manual acts should be "explicit and distinct" (Savoy Divines) as "a needful circumstance belonging to the sacrament" (Bp. Cosin), and the harmony of the construction requires that the people should follow the whole consecration, acts as well as words, all the acts as well as the one act to which (probably for other reasons) a direction is attached. The rubric does provide "that the priest may with readiness and decency break the bread and take the cup into his hands." The word "readiness" relates to his own convenience, the word "decency" to the becomingness of the action in the eyes and view of the worshippers. Books of devotion frequently desired communicants to fasten their eyes upon these actions of the priest. To hide them would be as if the signing of the child with the cross were hidden in baptism.

The significance of those acts being open lies in what was the principle from the beginning, however overlaid at times. The consecration consists in the rehearsal and repetition of what the Lord did and said. "Hoc facere quod auctor fecit;" "Non observari a nobis quod mandatum est nisi eadem quæ Dominus fecit nos quoque faciamus" (Cyp. Ep. 63), and constant similar expressions give the primitive rule. Bishop Andrewes expresses its adoption by the English Church "Sic nos Ejus ductu et exemplo Qui hic præsidet" (Minor Works, p. 157, made his own by Cosin, v. 109).

The gestures which the Great High Priest is minutely recorded to have used were without doubt not only seen by the partakers, but meant for them—and it is no rehearsal of His action if the spirit and meaning of His acts are hidden—acts full of divine teaching and power. At Emmaus He repeated them, and was instantly known through them (Luke xxiv. 35).

If any ceremonial is to be visible to the people, that action of Christ unquestionably ought to be so by the rule both of the Gospel and of our Prayer Book.

The Court decides that the order of the Holy Communion requires that the manual acts should be visible.

2. The second question before the Court was whether the order of the Holy Communion, requiring that the manual acts should be visible, the hiding of the acts without the wish or intention to hide them constitutes a transgression of that order: in other words, whether such being the requirement of that order, it is a sufficient answer to a charge that they have been rendered invisible, to reply that there was no wish or intention to prevent their being seen.

The Court decides that in the mind of a minister there ought to be a wish and intention to do what has to be done, not merely no wish or intention not to do it; that in this case he must not hide the acts by doing what must hide them; that he must not be so indifferent as to what the result of what he does may be, as to do that which is certain to make them invisible.

The Court, therefore, reviewing the plea, rules that the Lord Bishop has mistaken the true interpretation of the order of the Holy Communion in this particular, and that the manual acts must be performed in such wise as to be visible to the communicants properly placed.

6. *Singing of the Anthem "O Lamb of God."*

The 6th article charges the Lord Bishop with having "caused or permitted to be said or sung before the reception of the elements, and immediately after the reading of the prayer of consecration, the words or hymn, or prayer commonly known as the Agnus, that is to say "O Lamb of God: that takest away the sins of the world—Have mercy upon us." The 5th answer in the

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responsive plea admits that "the choir with the bishop's sanction sang the words" at that place in the service.

It seems that they were not "said" by the celebrant or by any one. Nothing turns on the statement that they are "commonly called the Agnus." They were sung by the choir in English, being a well known hymn or anthem used in the litany, and forming part of the Gloria in Excelsis, in words taken out of the Bible (S. John, i. 29, and Ps. li. 1, *et passim*).

The sole question is whether the singing of these words by the choir was (as is charged) an "addition to the service in contravention of the ecclesiastical laws of England."

If so, it must be so for one of the following reasons: Either because (1) it is illegal to introduce into the service of the Church any hymn or anthem which is not ordered by the rubric; or (2) illegal to do so in this particular place of the Communion; or because (3) something in the words themselves renders them so unsuitable there that they are virtually illegal.

1. It was not contended in court that it is illegal to use a hymn or anthem in all places in the service where its use may not have been ordered.

2. The second ground for pronouncing this hymn or anthem to be an unlawful addition to the service, would be if the introduction of a hymn were unlawful at this particular place.

King Edward's first Act of Uniformity (2 & 3 Edw. 6, c. 1, s. 7) laid down this proviso that "it shall be lawful for all men as well in churches, chapels, oratories, or other places to use openly any psalms or prayer taken out of the Bible at any due time, not letting or omitting thereby the service or any part thereof mentioned in the said book."

The 49th Injunction of Queen Elizabeth, 1559, "for the comforting of such that delight in music . . . permitted that in the beginning or in the end of common prayers either at morning or evening there may be sung an hymn or such like song . . . in the best sort of melody and music . . ." This provision of "song" "in the end of common prayers" embodied in a rubric, remains through the accretion of other prayers, as the rubric for the anthem after the third collect. But although only this anthem became statute law, and the proviso of the Act of Edward

the Sixth was not re-enacted, yet the liberty assigned by that proviso of singing ". . . openly at any due time, not letting or omitting the service or any part" of it, appears to have been acted upon as a principle ever since without break. For example, the Queen's Visitors, Dec. 16, 1559, require the chapter of Exeter to allow "the people" "to sing a psalm" at the early matins and to see that the vicars should "aid and assist them" (Wilkins, Concil. iv. 201). Such continuous action seems, if anything can, to claim to be considered a contemporaneous concurrent exposition of the way in which hymns and *à fortiori* "song" "taken out of the Bible," may be used. For such continuous practice it would be difficult to declare that there was no legal ground to be found.

One kind of example of the practice would be the hymns, which are constantly used before and after the sermon in the Communion Service. The sermon in this service cannot be regarded as a separate function, as it can when it follows morning or evening prayer, or when it is preached without a service. In the Communion Office there are strict consecutive rubrics which assign to the sermon its exact place in that office, and a canon orders the bidding or some similar prayer to be used. Nevertheless a hymn or anthem is almost universally used in parish churches and others before or after the sermon and sometimes in both places. Another instance is the now prevalent singing of a hymn or of anthems during the collection of alms, along with the "one or more offertory sentences" which alone are directed to be "said" or "read."

In these three places of the Communion Service the original principle of the first Act of Uniformity seems to be strictly observed, viz., of singing "at any due time, not letting . . . the service . . . thereby." The times chosen are here the intervals of the clergy (1) moving to the pulpit and preparing to preach, (2) resuming their place with brief private prayer afterwards, and (3) the interval for the "churchwardens receiving" and "reverently bringing" the alms to be presented.

The singing in none of these places is permissible by the words of any statute or rubric, but no court or authority would consent to declare it illegal, because the prevalent use of it is by

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the principles of law a very safe assurance that it is not illegal. The once statutable proviso gives an account of its origin.

We come to the point of inquiring, whether singing during the distribution of the sacred elements (a practice less prevalent than at those other points of the service) either departs from the conditions formerly prescribed and since adhered to, or is so wanting in evidence of use, that it cannot be accepted as legal on the same principles as those other hymns or anthems which have been mentioned.

(1) As to the conditions formerly prescribed and since adhered to. The reception of the Communion is a period in which none of the congregation except each several communicant actually receiving at the moment is or can be taking part in the public service of the Church. It is the only portion of the service when that is the case. When the number of communicants is great this is a very long period, and for many worshippers becomes, in the experience of all, a strain on devout attention. It might naturally seem that this would under the old proviso have come under the definition of "any due time," at which "all men might use openly any psalm or prayer taken out of the Bible, not letting or omitting thereby the service or any part thereof."

That it seemed exactly such "a due time" when the proviso was framed is clear from the fact that, by the same authority which framed it, the anthem now questioned then stood ordered to be sung "by the clerks" (the men of the choir, the officiating priest taking no part) "in the Communion time," that is while people were communicating, "beginning so soon as the priest shall receive the Holy Communion."

The withdrawal of the appointment of a particular hymn cannot (for reasons which will presently appear) pass as a judgment that it was not a due time for a hymn.

It is not alleged that the hymn was so sung as to interfere with the communicants at the time of their reception, or to prevent them from hearing the words of administration.

(2.) The mere reasonableness of the conditions, however, or even proofs of expediency would establish nothing as to legality, unless it can be shown that usage has also adequately affirmed

it. This appears to the Court to be the case. The practice of congregations on such a point is not likely to be much on record, and in most country churches the fewness of the communicants after the bulk of the congregation had withdrawn would at once make singing difficult and dispense with the occasion for it.

Exceptional instances would prove nothing, but of the instances before the Court several in their very nature imply widely diffused and continuous usage in behalf of which no small amount of authoritative sanction can be alleged.

The "first metrical communion hymn written for and adopted" in the Church after the Reformation is the "Thanksgiving after the receiving of the Lord's Supper" printed first in the incomplete Psalter of 1561 and in the complete Psalter of 1562. (Sternhold and Hopkins.) This book is described in the title as "very meet to be used of all sorts of people privately." It is also stated on the title page to be "perused and allowed according to the order appointed in the Queen's Majesty's Injunctions, 1560;" that is, legally licensed for printing by "the archbishops, the Bishop of London, the chancellors of both universities, the bishop being ordinary, and the archdeacon also of the place" of printing, "or by two of them, the ordinary to be always one." "Perused and allowed" is the term used in the Injunctions (li.) where the licence is to issue from this body. It is not used of the licence of "the Privy Council" or of "Her Majesty by express words in writing." It is held by accurate critics that the result of "this tentative measure satisfied" the authorities that it was right "to raise the book from the position of a private manual into a public and authorised book for use in public worship." The licence had been for seven years, but within five years of its granting, as early as 1566 (Bodleian Lib.) the authorisation is "set forth and allowed to be sung in all churches of all the people together before and after the morning and evening prayers and also before and after sermons and moreover in private houses." In the next year (1567) the authorisation and licence were granted for ten years. At the expiration of that term the mere licence for printing was "cum privilegio Regiæ Majestatis," whilst the authorisation for singing remained as before. The sanction for singing in all churches is believed

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(Strype Mem., B. I., xi., II. xxi.) to rest on the proviso 2 and 3 Ed. VI., I., 7, and refers to the singing allowed in the late Injunctions of Queen Elizabeth and somewhat extends their effect. "The book itself bears on its face the object of use in public worship." (See throughout Julian, Dictionary of Hymnology "old version" and "appendix.") It was constantly printed in the small folio, small quarto, and the same other varying sizes as the Prayer Book, and in 1637 was published by the University of Cambridge (and by the royal printers ever after) in one volume with the Prayer Book.

In 1641 the committee appointed by the lords "touching . . . considerations upon the Common Prayer Book" suggested the amending of "The Singing Psalms" and that "lawful authority should be added unto them," meaning doubtless parliamentary authority. No fresh authorisation was ever given although the book may be said to have been in use universally in churches. The suggestion itself may be said to recognise this. It is not necessary further to discuss the authorisation. Its operative authority, whatever it was, applied equally with the other hymns and versions, to the "Thanksgiving after the receiving of the Lord's Supper," and there is no reason to doubt that it was sung according to its heading after the reception. As the people then (and much later) sate to sing (Shepherd on C.P.B. i. 306), its length, 124 lines, suited it for singing during long intervals—a point which will receive further illustration.

Bishop Lewis Baily's (of Bangor) Practice of Piety, one of the most popular manuals of the seventeenth and eighteenth centuries, published in 1610–1612, dedicated to Prince Charles, reached its sixtieth edition in 1743. It prescribes "After receiving of the Holy Communion . . . two sorts of duties: First such as we are to perform in the churches . . . jointly with the congregation," and of these "First, public thanksgiving both by prayers and singing of psalms . . . Thus far of the duties to be practised in the church." (pp. 348, 355.)

In 1622 George Wither's Hymns and Songs of the Church was licensed by King James I. as "worthy and profitable to be inserted in every English psalm book in metre." After its reprinting in 1632 it was licensed by Charles I. (Miller, Our

Hymns, p. 30.) It provides a hymn of 200 lines to meet, as it states, the "custom among us that during the time of administering the blessed Sacrament of the Lord's Supper there is some psalm or hymn sung, the better to keep the thoughts of the communicants from wandering."

Indirect but effective evidence of the generality of the practice appears in such a manual as Bishop Wetenhall's "Method and Order for Private Devotions" ("Enter into thy Closet"), five editions of which range from 1656 to 1684. It suggests the time "while the Communion is administering to others, . . . especially if there be no psalm-singing," as suited for ejaculations and meditations.

In 1696 appeared the version and in 1703 the supplement of Tate and Brady, similarly containing what were advertised as "the usual hymns . . . for the Holy Sacrament" (two of them more appropriate to the service before, and two after the consecration), designed to take the place, as it gradually did, of Sternhold and Hopkins. It was authorised by Orders in Council to be used in all churches.

The above evidence is not evidence of exceptional cases, but it is evidence of provision made by authority from time to time of hymns to be used in this place. It may further be observed in illustration of the subject (although, as has been said, records of such a matter are naturally meagre), that Wesley, in 1782, mentions with approval the playing of "low, soft, solemn" music "while we were administering" at Macclesfield parish church, as also the "solemn music at the post-communion" at Exeter cathedral (Journal, Mar. 29, Aug. 18).

Not only do many persons remember the singing of a hymn or verses of a hymn, while the Communion was being received, as not uncommon, and as an assistance to devotion and edification, but there are parish churches in which the tradition still is kept on greater festivals or when there are many communicants.

The custom is also to some degree attested by the Common Prayer Book of the Protestant Episcopal Church of America, which closely following our own, has in several places inserted in the rubrics directions for the doing of things which were commonly done though not expressed to be done. After the

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consecration prayer and before the reception it directs "here shall be sung a hymn or part of a hymn."

So far then as the singing of a hymn or anthem at this place is concerned, if only they be suitable and not in themselves exceptionable, the Court finds no ground to declare such singing illegal, but the contrary.

Before enquiring whether the anthem charged was suitable or not, we should under this head enquire whether the service was let or hindered by the singing of it. The charge states that it was sung "immediately after the prayer of consecration" so that there was no let or hindrance at that point. The charge states and the plea admits that it was "before the reception of the elements . . ." A doubt arose as to "reception" by whom? If it means that the celebrant did not receive the elements after the usual brief interval for his private devotion, nor proceed to administer them to the other clergy, and then to others in order, but waited until the end of the anthem before receiving, this would constitute an insertion in, or addition to the service, which would not be lawful. It would be in contradiction even to the line of the defence, which pleads that the singing ordered in the Communion time in the original rubric is not unlawful though no longer enjoined. But no evidence was adduced by the promoters to show that the service was interrupted. The learned counsel for the defence stated their conviction that although begun to be sung before the reception by the congregation, it was not interposed so as to delay the reception by the celebrant. No witness was called to establish the contrary, and if there were a doubt the defendant would be entitled to the benefit of it.

3. We must now enquire whether the anthem charged in this case was a suitable one.

In *form* it was. The two clauses which compose it are "taken out of the Bible" and so are nearer to the original conditions than any metrical version or hymn can be.

The objection, however, rather took in argument the form that this particular hymn or anthem having been ordered in King Edward's First Book, to be sung by the choir at this particular place, and having been omitted from the later books, ought on that account not to be sung here.

Since the Court finds that other hymns have been constantly and may lawfully be sung, it is necessary to enquire whether any other reasonable account of the omission of this one hymn is to be found in the construction of the service, or whether it was presumably omitted on account of its inappropriateness or positive unsuitableness.

It was not one of the "ceremonies abolished," but was "one of those retained" under the preface which gave the reasons for the abolition of some and the retention of others; and the mere reprinting of the same preface in subsequent books from which the anthem was left out would be no proof that it was abolished for the reason there given.

It was asserted in the arguments that it was omitted on account of its meaning or doctrine in association with the Eucharist; but no proof was advanced of this assertion beyond the omission itself.

On the other hand, there is an explanation arising from the very construction of the service, which has satisfied competent critics not concerning themselves with doctrine.

This particular anthem had been sung a first time just before the Communion Service in the end of the Litany. In King Edward's Second Book the Gloria in Excelsis, which also contained it, had been removed from its former place and set after the consecration with only the Lord's Prayer and one other prayer between. If the Agnus had been left in after the consecration it would there have been sung a second time, and then a third time almost immediately in the Gloria. It was natural to change this; and it is also worthy of note that in the same recension in which it was taken away from that place the words are repeated with variation three times instead of twice, as before, in the Gloria where it is retained.

This might have been thought a sufficient account of the omission, as it has been given by impartial scholars (Burbridge, Liturgies and Offices, p. 247).

But it becomes necessary to examine whether there are more serious motives for the change, since it was on doctrinal motives that the learned counsel rested the force of the charge. Are the words doctrinally unsuitable to be used at that point, and is

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there evidence beyond the charge itself (which might be otherwise accounted for) that they were thought so?

It has been argued with apparent force that Bishop Ridley felt so strongly against the Agnus, as here used, as positively to forbid it in his Injunction in 1550—the time when it was not only lawful but compulsory by the Prayer Book and the Act of Uniformity.

It is hard to believe that a person of Ridley's probity would act so, even if he had not been one of the principal persons in the composition of the Prayer Book the year before (Strype Memorials, ii., i. 134), and if it were not also (as it is) the purpose of this same second item of those Injunctions to enjoin (as itself states) that order "in the time of the Holy Communion" which was "appointed by the Book of Common Prayer" (Visitation Injunctions of Bishop Ridley: Works, Parker Soc. 319).

But the fact is that what Ridley forbade is another and different thing. In the Missal (Sarum Missal, Burntisland, c. 623), after the consecration and before the Communion (before communicating himself), the priest holding the broken bread in his hands over the chalice said the Agnus privately, the two other ministers drawing close to him and joining privately.

The Prayer Book of course excluded this action on principle, and appointed that "during the Communion time," i.e., while the people are communicating, the choir should sing "O Lamb of God" as a hymn.

What Ridley forbids is the continuance of the old practice of the priest. He says perfectly clearly, "No minister is to counterfeit the popish Mass . . . . saying the Agnus before the communion." In fact he requires that the order of the book he had just helped to compose and was now enforcing should be observed in this particular, and the anthem "O Lamb of God" be sung by the choir during the Communion.

It has been confidently said that only one explanation can be given "why it is deliberately not included in any of the later Prayer Books. The only answer can be (it has been said) because it was associated with the Mass and the Adoration of the Host. That is the only answer that can be given."

The same objection would of course lie equally against pas-

sages which are included. As to this passage, the objection had not occurred even to extreme reformers. On the contrary, in the severe review, point by point, of "the whole canon of the Mass . . . after Salisbury use," which Foxe prefixes to his narrative of Queen Mary's reign, the only objection taken to the Agnus is that it was said "privately";—"Lest the people should be edified," is the sarcastic note (Acts and Mon. B. x. V. vi. p. 365, ed. Cattley). But for a positive view of the matter we may refer to the Savoy conference, and to "the alterations and additions tendered" "as needful" to the bishops for their "acceptance . . . to be inserted in the several places to which they belong" (Petition of the Puritan Divines). These were drawn up mainly by Baxter, and presented by the Puritan or Presbyterian Committee (Reprint, Hall's Reliq. Liturg., vol. iv.).

Among their alterations and additions we find them recommending that after the consecration, and the minister having declared "This bread and wine being set apart and consecrated . . . are now no common bread and wine, but sacramentally the body and blood of Christ," the minister should, after a short prayer, "take the bread and break it in the sight of the people, saying, The body of Christ was broken for us and offered once for all to sanctify us: behold the sacrificed Lamb of God that taketh away the sins of the world." (Hall, iv. 70; Calamy's Life of Baxter, v. i. App. 32; History of Nonconformity, 1704, p. 91.)

This makes an application of these words, after consecration and before reception, strengthened as it is by the words "behold" and "sacrificed," more precise in its form and more predicative by far than if sung as an anthem while people are receiving. Yet there is no doubt of the ideal Protestantism of the great man who applied them in this definite way as innocent and edifying.

Seeing, then, that there is no evidence whatever to shew that Bishop Ridley or any one else objected to the choir singing this anthem at this place upon any doctrinal ground, and seeing that the Act of Parliament which established the Second Book lays down expressly that the First Book was "agreeable to the Word of God and the Primitive Church;" and seeing also that

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the typical Protestant representatives at the Savoy desired the restoration at this very place of the words in still stronger form, there is no ground left for believing that the words had then, or have now, any association with those Roman doctrines or practices which the Church of England repudiates.

Under these circumstances, although we might readily agree that the proximity of two other repetitions of the words in the Litany and Gloria may make them not the aptest anthem for use here, and may suggest their disuse, as apparently it did to the framers of the Second Book, the Court has not to consider expediency but legality. That use of them could only be condemned on the ground that any and every hymn at this place would be illegal, which cannot be maintained in the face of concurrent, continuous, and sanctioned usage. To condemn the singing of that text here as unsound in doctrine would be contrary to the real force of Ridley's Injunction, and to other unexceptionable Protestant teaching.

The Court concludes that the singing of it by the choir was not an illegal addition to the service.

7. *Lights.*

Articles 3 and 13 state:—3. That the Lord Bishop "used and permitted to be used lighted candles on" or apparently on "the communion table . . . during" the Communion Service "as a matter of ceremony, and when such lighted candles were not wanted for the purpose of giving light."

13. "That the use of the lighted candles . . ." is an "unlawful addition and variation from the form and order prescribed . . . by the said statutes and of the order of the administration of the Holy Communion . . . and . . . contrary to the said statutes and to the rubrics . . . and to the . . . canons."

The responsive Plea 2 of the Lord Bishop is that "throughout the celebration there were, without any objection being raised by him, two lighted candles on the Holy Table;" and that "these lights, whether required for purpose of giving light or not, are in his judgment and he submits lawful."

What is here both charged and admitted is that two lights in candlesticks on the Holy Table were alight from before the

Communion Service began until after it was over. It is not charged that there was an action of lighting or carrying lights about; but that two lights burning when and where they did while the service was proceeding constituted an unlawful addition to and variation from the form and order prescribed by the Acts of Uniformity, Prayer Book, and canons.

It has to be ascertained—

I. Whether two lights so alight have been at any time lawful since the establishment of the Book of Common Prayer; and

II. If so, when, if ever, and by what enactment they were made unlawful.

It is to be premised that there has been an accumulation of illustrative facts in the last few years, and it is held that in cases of this description, "and in proceedings which may come to assume a penal form, a tribunal ought to be slow to exclude any fresh light which may be brought to bear upon the subject." The Court therefore considers (as it has already laid down) that though very great weight ought to be given to any previous decision, yet that in the circumstances of the present case its decision ought to be based upon that view of the law which it is led to take by independent examination of all the evidence now at its command.

I. The first question is, have the two lights been lawful since the establishment of the Book of Common Prayer?

Before the reign of King Edward VI. many lights were constantly burning in different parts of churches; also in different parts of the service lights were lighted or brought in and carried about according to directions in the service-books. The missal contained no directions that there should be two lights on the altar during the celebration. It was not a rubrical prescription, whatever allusions may be found in the Consuetudinaria, or statutes of particular churches.

A canon enjoining the usage is preserved by Lyndwood as having been passed under Stephen Langton in 1222. It is said to have been repeated in 1322, though this date is not without difficulty; but a collation of many instances before the Court shows that, although generally adopted, the usage may perhaps not have been universal, nor the number on the altars strictly

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uniform, but varying from one to many. Church lists of furniture in use and of articles considered necessary for celebrating the Eucharist do not mention candelabra; they were not as a general rule required to be provided by the parish as articles essential to the service, though incumbents were not unfrequently desired to provide them.

In 1547 injunctions given by Edward VI. ordered that all the other numerous lights in the churches (as having superstitious meanings) should be extinguished, "but only two lights upon the high altar before the sacrament, which for the signification that Christ is the very true light of the world, they" (the ecclesiastical persons rehearsed) "shall suffer to remain still."

No act of lighting in service time is prescribed. But it is not disputed that these were alight during the celebration of the Holy Communion, as they are seen in abundant illustrations. The light that had been kept before the reserved host was single, cereus vel lampas.

Thus the same authority which effected the extinction of all the other lights ordered that two should remain in the position described.

In Litlyngton's capella portatilis an "enumeration of what was held necessary for the celebration of low mass"—21 articles—candlesticks are not named (Dr. W. Legg, Soc. Antiq. 1890); nor yet in the lists of Queen Mary's time of what parishioners were again bound to find and keep in the church, though in these and the older parish lists a paschal candlestick is almost always mentioned.

What amount of authority from Parliament, if any, accompanied the injunctions as made by the Crown in pursuance of the Proclamation Act is not material. The injunctions themselves and the compliance with them may be regarded simply as evidence that the lighted lights were not then contrary to law.

Cranmer, in his Visitations, which were legal proceedings, and had the authority of a Court, enquired whether the one class of lights, and ceremonies connected with them under several items, had been put away, and the two lights upon the altar retained.

The inventories of church goods in various counties have been

appealed to as showing that in 1552 candlesticks were left in many churches, but this evidence is of doubtful force, since the goods therein named were intended to be seized for the use of the king, and were so seized shortly after. But inasmuch as they were seized together with not only disused objects but with church bells, the lead of roofs, valuable English bibles, organs, &c., the seizing is no evidence on the other hand that they were illegal.

There exists a draft of articles to be followed by injunctions apparently in a new visitation. It is not dated, but from internal evidence "it is clear that these articles were drawn up after the Act of Uniformity had passed (Jan. 21, 1549)" (Burnet, H. R. Coll. 33, Cardwell, D. An. I. 74), "after the establishment of the Prayer Book" (Dixon, Hist. III. 38 n.). The draft proposes to order the clergy "in reading of the injunctions" authorized 1547, to "omit the reading of such as make mention of . . . candles upon the altar" (I.), and not to "set any light upon the Lord's board at any time." (II.) The draft has no authorization, not even the usual recital of the King's Majesty's command by the advice of the Protector and Privy Council (Dixon, l.c.), but Bishops Ridley and Hooper apparently framed their Visitation Injunctions (1550) to suit it (Cardw. D. A. I. 93). No search has yet discovered any authority for this action.

But the injunctions with the draft are evidence that up till then, after King Edward's First Act of Uniformity, lights were "set on the Lord's board," and that the "injunctions ordering them were received and read in" the churches. The lights were legal, and this draft could not make them otherwise.

II.—The second enquiry is, whether, being so far legal, they became by later enactment illegal.

1. The first statute which could have taken any effect of the kind is Queen Elizabeth's Act of Uniformity passed in her first year by Parliament on April 28, 1559.

In it was forbidden (s. IV.) the use of "any other rite, ceremony, order, form or manner of celebrating of the Lord's Supper, openly or privily, or mattens, evensong, administration of the sacraments or other open prayers than is mentioned and set forth in the said book," i.e. the Second Book of Edward VI.

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All these words (except for the substitution of "celebrating the Lord's Supper" for the word "Mass," are taken as they stand from Edward VI.'s First Act of Uniformity, and as in that Act they had not been held to make the lights an unlawful ceremony (since the draft injunction would not in that case have been prepared for the council) so it would be impossible to pronounce that the same words, without any further expression, in Queen Elizabeth's Act made them unlawful.

But in order to know exactly what is forbidden to be used we must explain the terms employed. These are not colloquial, but belong to the liturgical law of the Church.

The words "order, form and manner" are the formal titles of the Services in the Prayer Book. They stood thus in the book specified: "An order for Morning Prayer, An order for Evening Prayer, The order for the Administration of the Lord's Supper or Holy Communion, The Form of Solemnization of Matrimony, The order for the Visitation of the Sick, The order for the Burial of the Dead, The Form and Manner of Making and Consecrating Bishops, Priests and Deacons, The Form and Manner of ordering Deacons, The Form of ordering Priests, The Form of Consecrating of an Archbishop or Bishop." The word "order" is further used in it as the title of the arrangements provided for the psalms and for the lessons.

To these titles are added in our present book, to which the Act now applies, The order of Baptism both Publick and Private, and for those of Riper Years, The order of Confirmation, Forms of Prayer to be used at Sea, and Form of Prayer for the 20th of June.

What is forbidden in these terms "order, form and manner," is the saying of the various services according to any other service book, including the First of Edward VI., although this receives special commendation in the Second Act of Uniformity.

The other two terms, "rites and ceremonies," which are equally forbidden to be "other than is mentioned and set forth in the said book," (Second Book of Edward VI.) are also taken from the title of the book,—"The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies in the Church of England." Accordingly they include the "other

open prayers" which, in the language of the Act, are "for others to come unto and hear," besides the "Mattens, Evensong, and Administration of the Sacraments."

The term "rites" is used in the Articles of Religion 20 and 36, and in the preface of the last revision. There is a section "of ceremonies, why some be abolished and some retained." Both terms are used in the usual technical sense familiar in liturgical writers, and may apparently be applied, where applicable, to parts of services.

The word "rite" is held to include, if not to consist of, the text of the prayers and Scriptures read; the books called "rituals" containing these, while the books called "ceremonials" prescribe the mode of using the rites or conducting the service.

What was meant by "ceremony"—the word used in articles of charge 3 and 13—must be more clearly ascertained.

Merati, in his critical notes on Gavanti, cites the text of the Council of Trent, Sess. 2, cap. 5. "Cærimonias adhiberi—ut mysticas benedictiones, lumina, thymiamata, vestes aliaque . . .," and presently defines "Cærimonia" as "*actio* sancta cum exteriori Religionis cultu" (Gavanti Thesaur I. i. p. 2, 1763); thus following older writers (Macri Hierolexicon), "Cærimoniam esse ipsam *actionem* sanctam qua Divinus Cultus peragitur"; (P. Quarti Comment.), "est *actio* religiosa"—and it consists "in *gestibus* solis."

Morani's Dictionary defines a ceremony to be "a complex—consisting of actions, formalities and manner of doing, which render a thing more solemn" (Dizionario di Erudizione, vol. xi. 1841, s. v.). According to these definitions the word cærimonias in the tridentine clause, which Merati is illustrating, means the active employment of the enumerated articles, including lumina, by persons engaged in the service. And so our 18th canon speaks of "these outward ceremonies and gestures."

It is in this recognised sense that Dr. Donne (d. 1631) uses the words "Ceremony of Lights." He defends the "solemnising" of Candlemas Day (Sermons viii., xii. fo. 1640) by "admitting candles into the Church," "because He who was the light of the world was brought into the temple" on "this day of lights." He traces to the primitive Church the then extant custom of

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"this ceremony of lights" upon that day, "the multiplicity of lights by daylight;"—that which had been forbidden by an early council, having been, he says, only the "superstitious use of lights in the churchyards." But the use of two lights upon the altar does not come before him, or is only alluded to perhaps in his side-remark, that it is not desirable to condemn foreign churches for their use of lights.

There is no indication to be found that the words "rites and ceremonies" in the title-page of the Prayer Book, and in the Act of Uniformity which makes the book and its contents statutable, received any meaning beyond their usual acknowledged meaning.

It remains that a ceremony in worship is an action or act in which material objects may or may not be used, but is not itself any material object. As the making of the cross in baptism, the placing of the ring in marriage, so the carrying of lights in procession, the bringing them in or lighting them up or extinguishing them at certain parts of the service, come under the accepted definitions of a ceremony.

But it does not appear that the Act of Uniformity by the words forbidding every other "rite, ceremony, order, form or manner" altered the legality of the two lights standing lighted on the table during the service, if it was legal up to this time that they should so stand.

The xxviith section of the same Act voids all laws, statutes, and ordinances wherein or whereby any other service, administration of sacraments or common prayer was limited, established, or set forth.

This repeals all authorities which were in any way contrary to those sections (3 and 4) which introduced the new form. It does not alter anything else. If the lights are good under those sections they are not affected by section 27.

Again, the Act of Uniformity does not appear to have been supposed at that time to have altered the law with regard to them.

More than three years later than this Act, in August 1562, Parkhurst writes to Bullinger that the candles were daily lighted in the Queen's chapel (Zurich Lett. 53).

It is further stated that they were used "in all the Queen's

chapels during her whole reign," "constantly" in Lord Burleigh's chapel, and in many cathedrals, colleges, and other domestic chapels. It ought to be remarked that Bishop Cosin (v. 441) who states this as fact, does not say expressly that they were lighted; but the argument in which he names them along with Bishop Andrewes' chapel, and the Royal chapels before 1640, turns on their being so lighted, and he could not otherwise have set these examples against the common unlighted usage.

In the year 1565 the Queen, in the famous letter to Archbishop Parker (which however probably has the surplice most in view), transmitted to all the bishops, expressed herself as "specially in external decent and lawful rites and ceremonies to be used in churches," . . . "determined to have all diversities, varieties, and novelties reformed, repressed, and brought to one manner of uniformity."

And it scarcely is credible that the Queen, or her minister who laboured no less for uniformity, should have continued the use of these lights if it had been thought a breach of the Act of Uniformity and illegal by her own statute.

Before the end of the reign of Queen Elizabeth there is little doubt that lighted lights had generally gone out of use. Orders had been given by various authorities, regularly and irregularly, and executed for the "defacing" and "putting away" of objects which had been abused to superstition. It is true that the only interpretation which had at any time been put upon these lights was taken from the words of our Lord spoken at the lighting of the great candelabra in the Temple at the Feast of Tabernacles —"I am the Light of the World." It is true that both before and after the Reformation there was one constant meaning attached to them, "Christus est splendor lucis æternæ" (Stephen Langton's Concil. Oxon. 1222), "The signification that Christ is the very true light of the world" (Ed. VI., Inj. 1. 47; Cranmer's Article).

Nevertheless popular feeling connected them (as it did stained glass and other objects destroyed in defiance of authority) with superstitious associations. Scruples of bishops and chaplains officiating in the Queen's chapel are detailed, and the lights

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there after being removed and again replaced ceased to be lighted. Bishop Cox of Ely writes to the Queen . . . "prostrate and with wet eyes, I dare not minister in your Grace's chapel" (Strype, App. Eliz. No. 22). Archbishop Parker (Sir F. Knollys Parker. Corresp. lxvii. Oct. 13, 1559), also remonstrated against a crucifix with lights (cp. Zurich L. xxvii., 1560, Jan. 6; liii., 1562, Aug. 29; lvii., 1563, Ap. 26.) The wisdom of compliance in such a case cannot be questioned. But the Court has only to enquire whether the extinction was supposed to be in obedience to the Act of Uniformity or other statute, and thus far there is no indication that such was the case.

2. Other proceedings will now be reviewed in order of time which bear on the legality of lights, so as to ascertain if possible whether either their legality came to an end at any point or has been at any time competently affirmed.

In 1559 three injunctions of Queen Elizabeth were expressly directed against the setting up of candles by worshippers, "candlesticks, trindals, rolls of wax," in connection with superstition, pilgrimages, shrines, or feigned miracles, and they ordered the application to the relief of the poor and to reasonable repairs, of the profits belonging to foundations of the many lights formerly maintained before tombs and pictures and side-altars (Injunctions Eliz. 1559—3, 23, 25).

In 1563 the third part of the homily of the peril of idolatry argues against the same superstitious uses of lights, and has nothing to say to the two lights; but the tone of the sermon is scarcely consistent with the idea that lights were ordinarily used in divine service by daylight.

During the reign of James I. (1603–1621) lights were lighted in the chapels of the King, the Prince of Wales, and of others—as for instance Bishop Andrewes. But the language of Donne (to which reference has been made) would scarcely rest where it does if the custom had been at all prevalent (Serm. viii. xii. folio 1640).

In 1628 proceedings were instituted at Durham, under the Act of Uniformity itself, against several of the prebendaries of the cathedral on the charge of offences in matters of ritual. Section xvii. of that Act invested the Judges of Assize with

"full power and authority in every of their open and general sessions to enquire, hear, and determine all and all manner of offences that shall be committed or done contrary to any article contained in the Act."

Accordingly one of the prebendaries, P. Smart, preferred against Dr. Burgoyne, Mr. Cosin and others, four indictments of "superstitious ceremonies" and "contrary to the Act of Uniformity"—viz., to section iv., which prohibits "other rite, ceremony, order, form or manner . . . than is mentioned or set forth in the said book."

One of these indictments was "that they use wax lights and tapers." The "articles or instructions for articles against Mr. Cosin" and others, afterwards delivered to Bishop Harsnett (Surtees, Cosin Corresp. vol. i., p. 161), specify (art. 3) "tapers burning and not burning on the Communion Table."

The grand jury found nothing. The Judge, Sir James Whitelocke, Chief Justice of Chester, and one of the Judges of the King's Bench, "rejected the indictments in open court, letting the country know that he knew no law whereon they should be grounded." He added that he "himself had been an eye-witness that all things were done in decency and in order" (State Papers, Domestic Series, Chas. I., vol. cxiii. 19, Calendar p. 259).

A letter of the prebendaries (State Papers ut sup. 65, Parker's Introduction, cccxxxii.) gives a similar account of the "indictments at our last assizes concerning the ornaments of our Communion Table, &c. . . . All which by the commandment of our worthy judge Sir James Whitelocke, after he had himself been in the church and viewed the particulars, were rejected and thrown out of the Court." It was then "supposed that Smart was minded to prefer a bill against them in Parliament."

In July 1629 Smart again indicted Burgoyne and Cosin under the Act of Uniformity at Durham before Sir Henry Yelverton, who was Judge of the Common Pleas, a strong Puritan, as he openly declared. Of this second set of indictments the fourth was "for using the wax lights in the Church." On July 19 the prebendaries had an interview with Sir H. Yelverton, and urged that their practice was not "against the law." However, on the next day the Judge in his charge to the jury laid down that the

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prebendaries "might be in Court indicted," and the jury found accordingly.

But afterwards in Court the Judge "stayed the indictments" and forbade them to be filed, and said, "I must tell you I see no such direct law whereon to ground them now that I have considered of it" (State Papers, Dom. Ser., Chas. I., cxlvii. 15, 35, Cosin Corresp. I. lxxxvii.).

These two cases therefore exhibit the ruling of two competent judges in 1628 and 1629 in proceedings regularly taken under the Act of Uniformity itself, that the "using of the wax lights in the Church," which undoubtedly were lighted, was not contrary to the Act of Uniformity or to any statute.

With these two precedents the action taken in the proceedings against Laud agrees. Prynne, who was appointed with a committee by the House of Commons to manage the impeachment, was a learned and expert lawyer.

In the articles of "evidence to prove the first general part of the charge" he formally "prosecutes" the use of the credence table, the cope, and organs, the crucifixion in stained glass, the standing at the Gloria Patri, the bowing at the name of our Lord, and the use in question of lighted tapers. With these he speaks of "our parish churches and chapels" as being "all miserably defiled" (Prynne, Complete Hist., p. 64, 1646).

The articles set out generally that (p. 62) our statutes, homilies, injunctions, canons, writers, condemn altars, tapers, crucifixes, and (p. 123) state the specific charge of "two silver candlesticks with tapers in them on the altar."

With regard to these last, the pleas are (1) that the use of lights "burning by daylight" in the King's chapel was no defence, as they ought to have been extinguished there also; (2) that the archbishop his predecessor had not used them; (3) that they were expressly prohibited by injunctions of Queen Elizabeth (1559), 3, 23, 25; (4) and by the homily against peril of idolatry (Q. Eliz., 1563, part 3, p. 50, 51. 207 ff. Oxfd. ed.).

Taking pleas (3) and (4), which refer to authoritative documents:—The language of the homily, considered as evidence, is seen to be really directed against candles before images, shrines,

&c., though it is scarcely consistent with any common use of lights in daylight service. It has however no claim to legal authority. The injunctions of Queen Elizabeth, we have already seen, relate to ceremonies and usages otherwise illegal and not to altar lights. No judgment apparently was given upon the lights.

The important point to notice is that Prynne does not proceed upon the Act of Uniformity. There can scarcely be clearer evidence that it was not held by him and the committee that the Act had made the lights illegal.

At the same time it would appear from the statements in the same Articles of Evidence, that there were at least many places in which they were lighted. (Prynne, *loc. cit.*)

Thus far, up to the time of the Commonwealth, no proof has been found that the two lights which had been retained by the same authority in Edward VI.'s reign which operated to remove all the other lights had ever been pronounced, even when attention had been directed to them specially by Parliamentary and other prosecutions, to be contrary to the Act of Uniformity or to any statute; or to have been abolished by any authority, or to constitute a ceremony; or to have been abused to superstition, no symbolic sense or meaning having ever at any time been attached to them, except that "Christ is the Light of the World."

They were from time to time attacked as Romanising, or as in themselves unreasonable, but when the plea of illegality was brought up it was rejected and not revived.

After the Restoration, between the years 1660 and 1680, no evidence of the lights being lighted has presented itself though the lights themselves were common.

But from 1680 to 1740 or 1750, a large amount of a certain kind of evidence appears which can neither be accepted nor disregarded without caution.

During this period there issued from the press many books of devotions, and illustrations of the Prayer Book, in which there are representations of church service, naturally not taken from particular churches. There are also special representations of ceremonial, and architectural plates on a large scale, and some

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fine historical engravings. In both classes of designs the Holy Table is frequently shown with its vessels and furniture, both as in the communion time and as prepared in readiness for that service.

In such a detail the engraver might perhaps be supposed to have followed his fancy. On the other hand, it both was well known that the question as to the use of lights had formally been raised, and there was during that period no controversy stirring about its legality; again, the particular books are sometimes edited by learned persons in important positions, sometimes are famous editions of the Prayer Book by the Queen's printer; and again the finer historical engravings are very minute. There is no indication of bias in these drawings, and if there were bias in one direction there would certainly have been bias in another. The unlighted candles appear to be engraved as exactly as the others, and on the whole it may be concluded that the artists drew what they usually saw, and that the evidence is such as should in fairness be considered, although not on a level with the evidence which the Court has already weighed. In so considering it, it is necessary to distinguish altered designs from plates engraved merely one from the other.

Out of about forty such plates and verbal notices referring to this period 1680–1750, in a careful list of such as were brought before the Court, with others of a like character, there appear some fourteen independent evidences of communion tables without lights, or with unlit lights, or lights to be lighted for convenience.

Among these are the plate of James II.'s coronation and the express words of the scurrilous Hickeringill, and the learned Lathbury and Wheatly, who distinctly recognise lights unlit by day.

In the same period there also appear some twelve independent instances of lights lighted by day. Among these are the plates of the coronation of William III., the thanksgiving of Queen Anne, and in books by Dean Addison, Dean Brough and Bishop Patrick. Hickeringill, who ridicules unlighted lights, ridicules lighted lights in 1681, and unlighted lights in 1689. It is remarkable that in Picart's magnificent work there is a very

large plate representing "The Communion of the Anglicans at S. Paul's," and that the Amsterdam edition of 1726 has the lights unlit, but that the London edition of the following year shows them lighted.

The result is that in the quiet and consciously Protestant period between 1680–1750 the evidence for and against the use of lights lighted or unlighted seems to be very equally balanced.

In the extension of the same list from 1750–1847 there appears no instance of lighted candles either in engraving or verbal notice. It would be to omit a relevant fact if it were not remarked that this last was a century in which comparatively little attention was paid to ritual.

It is impossible to say what may remain unobserved, but so far eight instances present themselves in that century without tapers, and eight with them unlit.

If then the whole time from 1660 to 1847 is reviewed there is no trace of lighted lights having fallen into any doubt of legality.

Between 1620–1640 it was endeavoured to make them an offence under the Act of Uniformity, but this plea failed and was abandoned.

The yet earlier history of the law on the point has been already summarised, with the result that they were legal when and after the Prayer Book became law and so remained,—a scheme to make them otherwise not having been completed, the Acts of Uniformity having no bearing upon them, and their very general disuse being due to causes other than legal enactment. In most important examples the practice was surrendered in deference to common feeling, and the lighting was comparatively rare.

Throughout the whole period from King Edward VI. until recently (if we partly except the reign of Charles I.) their use appears to have been in the main attached to places or occasions of marked dignity, to such events as public thanksgivings and coronations of sovereigns, chapels of princes, nobles, prelates, colleges and cathedral or collegiate churches. There was however no privilegium entitling such times and places to fashions or ways elsewhere illegal.

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The more dignified and solemn mode of service which belonged to these places has become more diffused in the last half century, and together with enlarged choral arrangements, the fittings and furniture of churches, and their decoration, whether permanent and structural or, as in the use of flowers, texts, hangings, cloths, &c., more or less temporary, have become more careful and studied. A certain increase in the use of the lights has gone along with those things. They are placed near to the flowers, which modern taste rather than old use has approved, and to the cross, which after being disused has of late been admitted with some limitations as an architectural decoration.

It would be contrary to the history and interpretation of the two lights on the Holy Table to connect them with erroneous and strange teaching as to the nature of the Sacrament. It is not likely that they will cease to be distasteful to many minds, and where that is the case, even in a small degree, charity and good sense ought not to be violated.

The lawfulness of lighting the candles in the course of the service is not before us. But the Court does not find sufficient warrant for declaring that the law is broken by the mere fact of two lighted candles, when not wanted for the purpose of giving light, standing on the Holy Table continuously through the service; nothing having been performed or done, which comes under the definition of a ceremony, by the presence of two still lights alight before it begins and until after it ends.

8. *Sign of the Cross in the Absolution.*
9. *Sign of the Cross in the Benediction.*

The 7th and 11th Articles charge that the Lord Bishop in the administration of the Holy Communion on occasions named, "whilst pronouncing the absolution conspicuously and ceremoniously having both his hands elevated and looking towards the congregation, made with his hand (hands, Art. 11) the sign of the cross, and also that he again in like manner whilst pronouncing the benediction in the same service made the sign of the cross."

In Article 13 it is alleged that this is an "unlawful addition and variation from the form and order prescribed and appointed."

The responsive plea allows (12) "that whilst pronouncing the absolution he raised his right hand and made the sign of the cross with it looking towards the congregation," and (13) "whilst pronouncing the blessing . . . . made the sign of the cross with his right hand."

The definition of a ceremony includes this action. It is a formal symbolic gesture of religious meaning publicly made by the minister in his character of minister, rendering the delivery of language more solemn, and not merely expressing his personal devotion.

The sign of the cross made on the forehead of a baptized person is described in the canon (xxx.) as a "ceremony," and again a "lawful outward ceremony." The sign of the cross made as described in the act of absolving in the Holy Communion can be no less an outward ceremony. The point to inquire into is whether it is a lawful one, although not prescribed in the present Common Prayer Book or any former edition of it.

It cannot be supported by the canon on the use of the sign of the cross in baptism; the reasons therein given are only in explanation and recommendation of what is already a law as to that service; and the solemnity lent to the ceremony in that place by that explanation is rather evidence against its liturgical use unless it were expressly enjoined elsewhere.

As a solemn ministerial act this is not a mere continuation of one of those acts of devotion which by the "Explication" at the end of King Edward's first book were expressly left for a time, and possibly in principle, to the discretion of each person. When it affirmed that "As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures; they may be used or left as every man's devotion serveth without blame," it spoke of the acts of private persons. For example, the minister's "kneeling" is not left to his own devotion, but prescribed.

Nor is it like the bowing at the name of our Lord, which the canon, after the Injunctions of Elizabeth, sanctions on the ground that it is "accustomed," and so makes clear that it is not an infringement of statute. The minister, in this case, is affected only as one "of all persons present."

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The argument that the "omission of a direction is not a prohibition," has no meaning except in cases where it is also shewn that something has been omitted. To give it force in this case, it must appear at the least that this gesture was prescribed in the English church up to the time of the Reformation, and that her bishops and clergy continued to use it in giving the absolution or benediction, as it were traditionally and without correction.

Before the very word "omission" becomes applicable or requires to be considered at all, it must at least be shewn in order to uphold a ceremonial practice in the English Church Service, that the practice is one continued from our own earlier services. An observance, however widespread, if borrowed and introduced from foreign usages, or from a liturgy or rubric unknown to this country, cannot be treated as "omitted."

Both before and since the Reformation, English service books and their use have been framed on the principle laid down in our Article xxxiv., "that every particular or national church hath authority to ordain, change, and abolish ceremonies or rites."

Two cases of the use of the sign of the cross come under the consideration of the Court.

I. First, Of making the sign of the cross in giving the absolution.

It must now be pointed out that whilst in the Roman service the priest is desired to sign himself, but not the people, with the sign of the cross between what may be called two parts of the absolution (which begin with the words "Misereatur" and "Indulgentiam,") we find that in the corresponding English uses, of Sarum, which prevailed before the Reformation over most of England, as also in the uses of York and Hereford, there is no direction for even this, as it were private, crossing of himself by the priest,—in that which Maskell supposes to be the use of Bangor there is. In none of them is there a ceremonial signing of the people. Sarum, Burntisland ed. p. 58; Maskell, Anc. Liturgies, p. 12, Surtees, Hereford, p. 114; York, vol. i. p. 166).

If we go so far as to consider sources which might conceivably be supposed to have influenced English tradition at one or other period, we still find in the Pontifical of Egbert, in the

eighth century, no cross at the Absolution in the Liturgy, nor yet at the Absolution of the Sick. In the older liturgies which our reformers chiefly consulted, that of S. Chrysostom and the Mozarabic, in each of which there are many such signings, there is no cross at the absolution.

Thus there is no ground to allege that to make the sign of the cross at the absolution in the Communion Service is in any sense a continuance of old prescription in the Church of England, or a compliance with prescription which could historically affect our service.

This ceremony is an innovation, which must be discontinued.

II. Of making the sign of the cross in giving the final benediction.

What was before said as to the sign of the cross in the service of the Church being still premised, there are two distinct points to be observed. The first is this:

(1.) Our Order for Holy Communion ends with the rubric: "Then the priest (or bishop if he be present) shall let them depart with this blessing," and the form follows, which is commonly called the apostolic benediction. The words, "or bishop if he be present," were introduced in the Second Book of Edward VI. The Roman Missal ends with a shorter benediction ("Almighty God, the Father, the Son and the Holy Ghost bless you") which is given with the cross, signed thrice over by the celebrant.

But in England, before the Reformation, the Eucharistic office had no benediction at the end. In the Sarum use, the priest, after receiving the elements and ablutions, said the sentence of Scripture called "Communio," crossed his forehead, still looking eastward, then turned to the people saying, "the Lord be with you," and again to the altar, to say the post-communion prayer, and as before, crossed himself, looking east. Then he turned to the people and said, "the Lord be with you," which was his last word. They answered, "and with thy spirit," and were dismissed by the deacon's saying, "Benedicamus Domino," or else "Ite Missa est."

There is no analogy between this close of the service, and the last blessing of our own. There was in the older English service

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no final benediction with the sign of the cross (Sarum Miss. Burntisl. pp. 628–630; Maskell, Anc. Lit. pp. 136 ff.; Hereford, York, and Bangor; cf. Henderson, p. 135.) This is even attested by an abortive attempt to introduce it in 1539. (See Strype, Mem. Hen. 8, c. xlvii. p. 354, App. No. cix. p. 289.)

Now, it is evident that the different Roman benediction, with its triple crossing (whatever the time of its introduction), could not and ought not to have any effect upon ours.

It could only be by continuance of an English use, that the sign of the cross over the people could here be used in concluding our service, and in England the service prescribed no dismissal of the people with that sign.

So far there is no justification for using this ceremony.

(2.) There remains, however, a second usage which might be alleged in support of the use of the sign of the cross in benediction.

There was an antient special episcopal ceremony of benediction once almost universal in the Western Church called "Benedictio episcopalis super populum in missa." The custom had been long dropped in the Church of Rome, but it was continued in the Church of England up to 1549. (Maskell, M.R., i. p. cxlvii. ed. 2; Warren, Leofric M. p. lxiv.) When a bishop then celebrated in England up to the Reformation, there was interposed in the course of the service, after the consecration, before the celebrant took the Communion, a solemn form of benediction by the bishop, which consisted generally of three long sentences, varying like the collect, and ending with a fixed clause. Collections of these prayers formed a separate service book. This benediction was pronounced simply with a lifting up of the hand—manu dextera super populum elevata. There is no direction in Sarum, York or Exeter books that he should make the sign of the cross—none (except on Holy-cross day), in the antient Pontifical of Egbert (Surtees, pp. 59, 89). (See Sar. Man. lxxxii.; Miss. Btisl. p. 622; Surtees, York Mis. i. p. 195; Pont. i. 176; Barnes, Exon. P. pp. 4, 152;—Bangor MS., see Wordsworth, Pont. S. Andr. 75–83.) It is directed to be used on other occasions, but not in the Eucharistic benedictions in England. In the Church of Rome, on the contrary, and in other

foreign churches where these forms were in use, the fixed clause was directed to be pronounced with crossing; when they were dropped, a similar fixed clause with crossing was added at the end of the service (See Pont. Rom. Venet. ap. Juntas, 1543 (1520), p. 244). The Book of Leofric, which has it so in the time of Edward the Confessor, is a Romano-Gallic book (Warren, Leof. M. p. 63). Roman writers themselves have pointed out that their gesture was not primitive, and that simple lifting of the hand was scriptural (Durand, iv. pp. 58, 7, referring to Lev. ix. 22; Pascal, Liturg. Cath. 153, Migne, 1844), and it may be added in confirmation of this that St. Augustine, mentioning occasions on which the sign was used in public service, does not include absolution or benediction. (Ioan. Ev. Tr. 118, § 5.)

If, lastly, it is asked whether such crossing may not have been suggested by other principal sources which contributed to form our Prayer Book, the answer is that neither the two more antient Liturgies studied by our reformers, nor the Deliberatio of Herman (Cœna Dni. xcvi. B. Bonn, 1545), have any sign of the cross in their corresponding benedictions.

It has been thought worth while to follow up this minute detail to make it clear that no argument can lie for the use of crossing in the final benediction when given by a bishop in an English Communion Service, on the ground of its being the continuance, unprescribed, but unforbidden, of some earlier appointed usage. The result is, that (1) There was no final benediction ordered with or without crossing at the end of the pre-Reformation service in England; and (2) "The Benediction," which was given in the course of the service by bishops only, and not by presbyters, had in England, so far as can be traced, no crossing in connexion with it.

But though it is well to note this second point (2) as an illustration, it is noted ex abundanti, since that special form of blessing has no real relation to any part of our service. It was wholly dropped by the English Church at the Reformation, and a final benediction added, just as had been previously done by the Roman Church; and our final benediction is historically no revival of that ceremony, inasmuch as this final benediction was assigned to the priest in the First Book of Edward VI., and only

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in the Second Book was ordered to be said by the bishop if he were present, being said by the priest, if he is not.

The Court therefore finds that there is no justification either in direction or usage for making the sign of the cross in giving the final benediction; that the action is a distinct ceremony, not "retained," since it had not previously existed; and that, therefore, it is a ceremony additional to the ceremonies of the Church "according to the use of the Church of England" (Title C. P. B.).

This ceremony also is an innovation which must be discontinued.

A Court constituted as is the present, having wider duties towards all parties concerned than those of other judges, duties inalienable from that position which makes its members judges, considers itself bound further to observe briefly in relation to this cause that,—

(1.) Although religious people whose religious feelings really suffer might rightly feel constrained to come forward as witnesses in such a case, yet it is not decent for religious persons to hire witnesses to intrude on the worship of others for purposes of espial. In expressing this opinion the Court has no intention of criticizing the statements themselves which were in this case given in evidence.

(2.) The Court has not only felt deeply the incongruity of minute questionings and disputations in great and sacred subjects, but desires to express its sense that time and attention are diverted thereby from the Church's real contest with evil and building up of good, both by those who give and by those who take offence unadvisedly in such matters.

(3.) The apostolic judgment as to other matters of ritual, has a proper reference to these; namely, that things which may necessarily be ruled to be lawful do not, for that reason become expedient.

(4.) Public worship is one of the divine institutions, which are the heritage of the Church, for the fraternal union of mankind.

The Church, therefore, has a right to ask that her congregations may not be divided either by needless pursuance or by exaggerated suspicion of practices not in themselves illegal.

Either spirit is in painful contrast to the deep and wide desire which prevails for mutual understanding. The clergy are the natural prompters and fosterers of the divine instinct, "to follow after things which make for peace, and things wherewith one may edify another."

We have given judgment on each article as the several points have been considered. We give no costs.

LIGHTS.

TEXTS AND ENGRAVINGS INDICATING USAGE AS TO LIGHTS.

*** Smaller type indicates pre-reformation records, and changes under Queen Mary or the Commonwealth. Some instances omitted where covered by similar entries.

[1214-22	CANDLES.	In Sarum Cathedral were 2 of silver, 9 enamel, 2 tin, 2 iron. Also 2 each in 2 chapels.
1214-22	NONE.	But none in four other chapels. Osmund Register, i. pp. 128, 139-141.
1220-24	CANDLES.	Dean of Salisbury's inventory of 12 prebendal churches. At Mere 2 of copper; at Hill Deverel, 2 small, bronze, and 2 lesser, iron: draws attention to *defect* at Swallowcliff and Horningsham:—
1220-24	NONE.	But none returned, and none demanded, at 8 other prebends. Osmund Register, i. pp. 275-313.
1222	LIGHTS.	'Tempore quo missarum solennia peraguntur, accendantur duæ candelæ vel ad minus una cum lampade.' Stephani Archiep. ap. Lyndwood, iii. p. 7. [Cf. Leo iv. ad cler.: Labbe, viii. 33. Honor. iii. ad Ep. Brix. (1216-27); Greg. ix. Decr. III., xlii. 19.]
1240	CANDLES.	Walter de Cantilupe, Bp. of Worcester, requires Parishioners to provide one pair at least; more in important churches, unless Rectors have given them. Wilkins, Conc. i. p. 666.
1256	CANDLES.	Giles de Bridport, Bp. of Sarum, requires Parson to provide the candlesticks. Wilkins, Conc. i. p. 714.
1291	A LIGHT.	'Provideat sacerdos quod ab inchoatione missæ usque ad finem lucerna cerea ardeat.' Statut. Synod. Sodor. Dugd. Monast. v. p. 255 *n*.
1306 cir.	—	Robert Winchelsee, Abp. Cant. (Lyndwode, ed. 1550, fo. cxxxvi.) does not require them to be provided by *parishioners*, but only *candelabra pro cereo paschali*. 'Cetera omnia tam in . . . , quam in aliis hic non expressis, secundum diversas consuetudines approbatas, a locorum rectoribus et vicariis,' &c.]
1322	LIGHTS.	'Tempore quo . . . ad minus una' (as 1222). Canon of Council of Oxford (Walterus Archiep. Cantuar.). Lyndwood, *Prov.* i. p. 236; iii. p. 40 (Lib. 3, fo. cxxix. ed. 1550). L. remarks, 'Candela ardens signat ipsum Christum, qui est Splendor lucis æternæ.'

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1367	—	The articles required by Abp. Simon Langham to be provided by parishioners are the same as by Abp. R. Winchelsee, cir. 1306. Simon's Constit. (not in Lyndwood or Wilkins) preserved in W. de Swynflete's MS.
1368	CANDLES.	Archdeacon W. de Swynflete's Inventory of Ornaments, shows in 8 city parishes of Norwich, 4 churches with two candlesticks, or more, in each:—
	NONE.	3 churches, 1 chapel, 1 chantry without candlesticks; one apparently without altar candlesticks. (Harrod, Norfolk Archæ., vol. v. p. 89.)
1374 cir.	NONE.	In Litlyngton's *capella portatilis*, 'enumeration of what was held necessary for celebration of low mass' (21 articles) candlesticks not mentioned. Dr. Wickham Legg, Westminster Inventory of 1388. *Soc. Ant.* 1890, pp. 12, 82.
1385 cir. [? 1365]	LIGHTS.	'Sine igne, i.e. sine lumine, celebrare non licet . . . ignis enim signat dilectionis fervorem.' J. de Burgo, Canc. Cantab., Pupilla Oculi, i. c. vii. fo. 18, 2.
1388	CANDLES.	Register of Vestry of Westminster Abbey has 8 candlesticks [2 very large, given by Hen. III.] and 4 of silver (with arms of Simon Langham). The minor Register of 'mediocre' things has 4 of laten [and 9 others erased]. (Dr. Wickham Legg, *Soc. Ant.* 1890.)
1450 cir.	'ONE CANDEL.'	'Set hyre, so that thou hyre se, On y° lyfte halfe of thyn autere.'— Myre's Instr. for Parish Priests.
1485 cir.	CANDLES.	'Ye shall inqwyre whether ye have sufficient . . . candilstikks . . . And if ye lakke any of thes, . . . ye shall present it.' Charge of Archd. of Sarum, 'Miscellanea et Statuta quoad Sarum' lf. 50°.
1532	NONE.	On high altar at Westminster Abbey no lights (at time of Abbot Islip's obsequies). Rock, ii. p. 500.
1536	? CANDLES.	Lincoln Cathedral, with many altars, has in the Revestry only 4½ pair of candlesticks. No altar named but the high altar. [Dugdale, Monast. vi. p. 1280.]
1539	LIGHTED.	Justus Jonas' Catechism shows lighted candles at Communion. Such pictures were *alleged* by Bp. Gardiner against Cranmer as inconsistencies. But see 1548, 1550.
1547	LIGHTED.	'. . . but only two lights on the high altar before the Sacrament, which, for the signification that Christ is the very true light of the world, they shall suffer to remain still.' Injunctions of Edw. VI.
1547-8	LIGHTED.	Cranmer's Visitation Articles: '. . . but only two lights upon the high altar' ('before the Sacrament' is here no longer specified). Sparrow's Collection, p. 26: Wilkins, iv. p. 23.
1548	? CANDLES.	Lincoln Cathedral in Revestry Inventory 2½ pair of candlesticks. (Brit. Mus. Lansdowne MS. 207. D.)

1548 (Apr.)	CANDLES.	Dio. Lincoln. Out of 37 parishes in R. Deanery of Calcewaith, 2° Edward VI., only 15 churches *have candlesticks.*
	NONE.	In same Deanery, 22 churches *have none.*
1548	No INDICATION.	Cranmer's Catechism: In his 'Answer to a Craftie and Sophisticall Cavillation' Cranmer replies to Gardiner that he is not responsible for the pictures in the Latin of Justus Jonas (1539). His own Catechism has Scripture pictures in the places referred to.
1549	NONE.	'Articles to be followed and observed, according to the King's Injunctions and Proceedings'—direct parsons, &c., to omit when reading the Injunctions, 'all such as make mention of . . . candles upon the altar.' No minister is 'to set any light upon the Lord's board at any time.' Cardwell's Documentary Annals, i. pp. 63, 64. From 'Dr. Johnson's MS.' Burnet, Hist. Ref. ii. app. p. 165. These Articles compiled after the Act about Marriage of Clergy [Dec. 1548], but before the Prayer Book came into use. (Burnet.) 'After Act of Uniformity passed (Jan. 21, 1549) which enjoined First Book of Common Prayer' (Cardwell, *l. c.*). 'After the establishment of the Prayer Book' (Dixon). The Draft has no authorisation. 'Not . . the usual heading about the King's Majesty and the advice of his Uncle and Council.' (Id.)
1549 26 Apr.	CANDLES.	'We hear that some concessions have been made . . . such . . . as the vestments . . . and the use of candles.' Letter of Martin Bucer and P. Fagius to the Ministers at Strasburg. (Parker Society, Original Letters, ii. p. 536.)
1549 27 Dec.	CANDLES. (London.)	'In some places . . . they still retain the vestments and candles (?) before the altars, and in the churches.' Translation of Hooper's Letter to Bullinger. Parker Soc. Orig. Letters, i. p. 71.
1550	CANDLES.	'The candles, vestments, crosses, and altars ought (by godly people) to be' relegated, &c. Hooper's 6th Sermon before the King.
1550	NONE. (London.)	Ridley's Visitation Articles for London. 'That there be no reading of such injunctions as extolleth . . . candles,' &c. 'That no minister do counterfeit the popish mass in . . . setting any light upon the Lord's board.' Ridley (Parker Soc.), p. 319.
1550	No INDICATION.	Before he would enter the choir at St. Paul's (April 12) Ridley orders to put out 'the lytt of the aulter,

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		i.e. lamp suspended before it. Chronicle of the Grey Friars. Camden Soc. 1852. [*Obs.* not the candles; Milman Annals quotes incorrectly.]
1550	UNLIT.	Gardiner, in criticising Cranmer's 'Lord's Supper,' implies that lighted candles are now disused. Cranmer (Parker Soc.), p. 227.
1551	NONE. (Gloucester.)	Hooper's Visitation Articles for Gloucester (before May 4). 'Item, that you do not read any such injunctions as extolleth . . . candles,' &c. 'Item, that none of you do counterfeit the popish mass in . . . setting any light upon the Lord's board.' Hooper's Later Writings (Parker Soc.), pp. 127, 128.
1552	CANDLES.	In one Leicestershire R. Deanery dio. Lincoln 19 churches have candlesticks.
	NONE.	In the same Deanery 21 churches have none.
1552 Sept.—Oct.	CANDLES 'for thuse of the Kyng.'[1]	In Lancashire. Two littill candilstyckes off brasse standyng on ye aulter (besides 2 great candlesticks) at Blackrood, to be held under indenture for the King. Bury has 3 to stand upon ye alter.
	CANDLES.	Of 67 Lancashire churches 18 have 2, or more, each.
	NONE.	Of 67 Lancashire churches 47 have none, 2 have one. Chetham Soc. vols. cvii. cxiii.
1552	CANDLES.	Inventories.—In Worcestershire 60 churches *have candlesticks.*
	NONE.	Inventories.—In Worcestershire 62 have *none.* Associated Archit. Soc. Report and Papers, vol. xl.
1552	CANDLES.	Of 11 Canterbury City Churches 4 have two or more each.
	NONE.	Of 11 Canterbury City Churches 7 have none.
1552	CANDLES. NONE.	Inventories (*i.e.* 2nd set). 1400 churches each with two candlesticks, out of 2800. J. Parker.
1552	LIGHTED.	A book on desk between two lights on altar. Tyndale's New Testament (in Rev. xi.) by Jugge. 'The quier is ungodly teachers and rulers.' (Lambeth Lib.; Mr. J. R. Dore). . . Earlier cuts (Coverdale 1538, Matthew 1549), have here only one light central.
1553	NONE.	Lincoln Cathedral Inventory (M. Parker being Dean), no candlesticks. Dugdale, Mon. vi. p. 1287.

[1] The Inventories of 1552 mostly relate to goods delivered to safe custody not for Divine Service but to be seized for the King's use; they include bells, roof-lead, English Bibles, organs, &c.

1553	NONE.	No candlesticks among plate allowed by Commissioners to remain at St. Paul's. (In A.D. 1295 there had been 5 pair of candlesticks.) Dugdale's St. Paul's, pp. 199, 274.
[1554		Not enumerated among ornaments to be found by parishioners or others. Bonner's Articles, i., iii., v., vi.; Cardwell, Doc. A. i. 150.]
[1555	?	'Lampas vel cereus coram Sacramento continue ardeat' i.e. not candles at the Office, but a perpetual light. Card. Pole's 2nd Decree, ibid. i. p. 147.]
[1557	?	The same. 'To be provided with expedition.' Card. Pole's 23rd Article. Cardwell, Doc. Annals, i. 207.]
[1557	NO INDICATION	of any on the high altar in Lincoln Cathedral under Philip and Mary. Inventory, Dugdale Monast. vi. p. 1290.
	CANDLES.	Only these: 'One pair of bearing candlesticks of lattin. Another pair of a larger sort standing on the altar in our Ladies chore. Another pair of bearing candlesticks broken.]
1558	CANDLES.	In Lincolnshire 91 churches have candlesticks.
	NONE.	In Lincolnshire 45 churches have none. See Peacock's Church Furniture.
1559-61	CANDLES.	Churchwardens St. Christopher-le-Stocks in City of London, though many ornaments (from 1484 list) sold in 1534 and 1536, and list revised in 1550, still kept a 14th cent. pair of silver candlesticks, a pair of laton standards, to set before the high altar, another for obits; a smaller pair to set on the altar, 3 of laton and 3 other pairs. They retained one pair till July 24, 1559, but had sold them before May 2, 1561. Archæologia, vol. xlv. pp. 111, 123.
1559-1603	LIGHTS.	'Two lights were, by virtue of the present Rubric afterwards continued in all the Queen's chapels during her whole reign.' Coin, V. 440.
1560 Mar. 6	LIGHTED.	Dr. Bill, Dean of Westminster, preaching in the Queen's chapel. Strype's Annals, p. 196. I. i. 297.
1560-95	LIGHTS.	'It was well known that Ld. Treasurer Burleigh (who was no friend to superstition or popery) used . . . these lights constantly in his chapel.' Cosin, v. p. 441.
1562 (Aug.)	LIGHTED.	in the Queen's chapel daily. Parkhurst to Bullinger. Zurich Letter, No. 53.
1563 (Apr.)	UNLIT.	not now lighted in the Queen's chapel. Parkhurst to Bullinger. Zurich Letter, No. 57.
	CANDLES.	See woodcut in Melancthon's 'Formæ Precationum' (Chambers, Divine Worship, p. 396). The Protestants at Wittenberg.

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LIGHTS.	1565 (Sep. 20)	LIGHTS.	At a Christening in Q. Elizabeth's chapel, Westminster, 'Communion Table furnished with 2 great candlesticks double gilt, with lights of virgin wax'; but this at 5 P.M., with many other lights. Add. to Leland, Collect. ii. 692.
	1565-6 (Jan. 24)	CANDLES.	'A pair of gilt candlesticks on the table' in Q. Elizabeth's chapel, Westminster, at Installation of Knights. Ashmole's Order of the Garter, p. 369.
	1565 Mar. 24	LIGHTED.	Bp. Barlow, Strype's Annals, p. 197, I. i. 298.
	1566	NONE. / CANDLES.	Lincolnshire: In the course of 9 years, last past, 87 churches have destroyed or sold all candlesticks. 4 churches retain candlesticks at the date of this return. See Peacock's Furniture.
	1567	NO INDICATION.	Grindal and Horn. Lighted tapers (i.e. torches) given up in England. Zurich Letters, No. 75, Ser. i. p. 178. [*Obs.* This refers to baptismal rites.]
	1610	NONE.	'The communion table.' Foxe Acts and Mon. (Stationers Co.), p. 1178.
	1621	LIGHTED.	Laud's chapel at Aberguilly (St. David's), Prynne's Canterburie's Doome.
	1624-5	LIGHTED. [AT NIGHT.	'Candlemas at night . . he caused 300 wax candles to be lighted . . placed threescore of them on and about the altar.' 'He framed a superstitious ceremony in lighting the tapers which were placed on the altar,' at other times. Smart's Articles against Cosin at Durham (1640, dismissed), Nos. 7, 15, 18. Nalson, i. pp. 789, 790. Cosin's reply 'never so many as 200 in all the church . . . Merely did his statutable duty as treasurer . . . only 2 fair large tapers on the communion table . . . with a few small sizes near them that the people about might see to sing and read. Life, p. xxviii.
	1625-1640	LIGHTS.	'These lights continued in all the king's and in many cathedral churches, besides the chapels of divers noblemen, bishops, and colleges to this day.' Cosin, v. 441.
	BEFORE 1628	LIGHTED.	The King's Chapel, Whitehall. Cant. Doome, p. 63.
	1628-9	LIGHTED.	Durham Cathedral. State Papers Dom. Chas. I., cxlvi. 15, cxlvii. 35. Indictments against Cosin and others dismissed by Judges Whitelocke and Yelverton. Cosin Corresp. I. lxxvi. ff.

1633	? UNLIT.	'*unlight*' at coronation of K. Charles I. at Edinburgh. Spalding, Troubles in Scotland, p. 16 (ap. Roberts on, How Conform, ed. 2, p. 89).
	? LIGHTED.	'*on light*' at coronation of K. Charles I. at Edinburgh, id. ed. 1829 (Aberdeen), p. 16. (See Hierurgia Angl. p. 192).
	"	'*on light*' at coronation of K. Charles I. at Edinburgh. Ed. 1792 (Aberdeen), p. 33 (See Wordsworth.)
1633	LIGHTED.	This (according to the emendanda) is the date endorsed by Laud on the plan of his chapel. Canterburie's Doome, p. 123 (1646).
1635	CANDLES.	Peterhouse Chapel, Cambridge. See Parker's Introduction to Revisions of Common Prayer (1877), p. 363. Cant. Doom, pp. 73, 74.
1637	CANDLES.	Bp. Williams has them at Bugden; likewise at Lincoln and Westminster. Lathbury, Com. Prayer (Heylin), p. 169.
1637	UNLIT.	'Those candlesticks and unburning tapers which some popish novellers place for a double show upon it.' Prynne's Quenchcoal, p. 34.
1638	CANDLES.	Account for plate at Peterhouse, Cambridge. 'For t[w]o candlestickes imbosed and all gilt over for the chapell, wayinge 145 oz. 13 wt. . . . For the addision to the candelsticks, 26 oz. 17 wt.' Bp. Cosin's Correspondence, i. pp. 223, 224.
1640	CANDLES.	Donne's Sermons, 8 and 12. (Candlemas.)
1640	LIGHTED.	By virtue of this present rubric ('ornaments') . . . in the king's chapel, and in many cathedral churches, besides the chapels of divers noblemen, bishops and colleges to this day. Cosin's Works, v. pp. 440–1. (Notes, 3rd Series.)
BEFORE 1641	LIGHTED.	'Wax candles, tapers,' another cries and calls 'These brought I with me, from Cathedral Paul's' . . . . . 'a consecrated light: 'When we at matins, and at evensong were 'We had them by us then devoid of fear.'—Lambeth Fair, 1641.
1641	CANDLES.	May 2nd. Marriage of Princess Mary to William of Orange. Add. to Leland's Collectanea, v. p. 339.
1641	NONE.	Abolished by Declaration of the Commons. Rushworth's Collections, iv. 386. [*Obs.* The candlesticks yet survived in some churches.]

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	1644	CANDLES.	'The candlesticks . . . that stood heretofore upon the altar at St. Paul's were ordered to be sold.' Walker's Sufferings, p. 13.
	1655	NO INDICATION.	Sparrow's Rationale, ed. 1 Hollar. (Lambeth; ed. ? Hollar 1657 (C. W.); ed. 2 1660 (Brit. Mus.); ed. 1664, Hollar (Mr. H. H. Gibbs); 1668, 1676, 1678, 1684, 1704, 1717, 1839.
	1660	UNLIT.	At St. Paul's, at Whitehall, &c., 'his altar with candles on it, most nonsensically unlighted too.' Hickeringill's Works. Ceremony-Monger. ii. pp. 393, 405 (see 1682, 1689).
	1660	CANDLES.	Cosin's note: 'Bene B. Lutherus in formula Missæ sive Communionis quam Wirtenburgensi Ecclesiæ Anno superioris seculi xxiij° præscripsit, Nec Candelas (inquit) nec Thurificationem prohibemus, sed nec exigimus; esto hoc liberum.' Works, v. p. 233.
	1660	NO INDICATION.	Sparke's Scintilla Altaris, ed. 2 (Lambeth); 1666 ed. 4.
	1661	NO INDICATION.	Jer. Taylor's Worthy Communicant, Mystical picture, ed. 1 (Lambeth); ed. 5, 1670 (C. W.)
	1662	UNLIT.	Coronation of King Charles II. Hollar's print (Soc. Antiq.).
	1666	CANDLES.	New candlesticks bought for Norwich Cathedral. Blomefield's Norfolk, v. p. 32.
	1667	UNLIT.	(April) at Windsor, feast of St. George Ashmole's Instit. Ord. Garter, p. 500.
	1667	CANDLES.	(Probate, June 10). Candlesticks bequeathed to Pembroke Chapel, Cambridge, by Bishop Wren.
	1667	CANDLES.	(July 11.) Gift by Bishop Cosin to Auckland Castle, Durham. 'Imprimis: duo magna candelabra argentea et dupliciter deaurata, tres pedes alta, opere celato fabricata, et super Altere, sive Mensam Dominicam, quotidie locanda.' Cosin's Correspondence, ii. p. 169.
	1668	CANDLES.	'They have at Lincoln a pitiful pair of ordinary brass candlesticks upon the altar, which, &c.; I find . . . before they were embezzled a pair of copper candlesticks, gilt. Why may I not have the like?' W. Fuller, Bp. of Lincoln, to Sancroft, Dean of St. Paul's.

1674	UNLIT.	Hickman's Animadversions on Heylin's Quinquarticular History.
1674	NONE.	'Ἐνιαυτός, ed. 2, pp. 218, 276 (Rev. B. Moultrie).
1676	NONE.	Comber's Companion to the Temple.
1677	NONE.	Herne's Domus Carthusiana (Lambeth).
1678	NO INDICATION.	Book of Common Prayer, Bill and Barker (C.W.).
1681	LIGHTED.	T. De Laune's Present State of London. (See Chambers's Divine Worship, p. 286.)
1681	LIGHTED.	Hickeringill, Black Nonconformist, Works, ii. p. 147, 'bowing . . . to the east, to the altar, towards the lighted candles.' (See 1660.)
1682	LIGHTED.	The Communicant's Guide. (See Chambers, p. 402*a*.)
1683	NONE.	Flagons at the two ends. Smythies' Unworthy Non-communicant. (B. M.)
1684	NONE.	Book of Common Prayer.' (See Chambers, p. 209.)
1684	UNLIT.	'The House of Prayer.' Patrick's 'Devout Christian,' 6th ed. (L. L.) See 1717.
1686	LIGHTED.	Gunton's Peterborough. [*Obs.* this view represents what is stated to have been in 1643.]
1686	LIGHTED.	Addison's Introd. to the Sacrament (inf. 1693) licensed by Abp. Sancroft, April 1, 1686, has both the plates as in Chambers, pp. 292, 402*b*. (At Sermon in Communion Service by day; no other lights in church.) F. H. Van Houe, sculpsit. (Br. Mus.)
	NONE.	
Cir. 1686-9	CANDLES.	Two candlesticks, gilt, borrowed for use in Durham Cathedral from the Mayor, by Dean Granville, while their plate is being changed. Surtees Soc. Miscellanies, i. p. 213.
1687	UNLIT.	Sandford's History of the Coronation of King James II., S. Moore del. and sculp. (Br. Mus. Lambeth).
1688	LIGHTED.	View of Peterhouse Chapel, Cambridge (Dr. Joseph Beaumont, Master). Loggan's Cantabrigia Illustrata.
1689	LIGHTED.	Engeland Beroerd, &c. Dutch account of the coronation of William III. (Mr. H. H. Gibbs).
1689	UNLIT.	'A candle unlighted. . . . It is needless to expose it, and yet it is retained as a thing of value.' Hickeringill, Ceremony-Monger, works ii. p. 441, ed. 1716, 'only the candles on our altar, most nonsensically, stand unlighted,' p. 405.

1890 ——— READ v. BISHOP OF LINCOLN. ——— LIGHTS.	1693	NONE.	The Christian's Manual, ed. 4, frontispiece.
		LIGHTED.	" " p. 65.
		NONE.	" " (a third picture.) The Glory of the Lord here envelops the back of the scene. (The 2nd and 3rd of these are figured by Chambers, pp. 292, 402*b*., from L. Addison's Introduction, ed. 4; ed. 5, 1719.) See above, 1606. F. H. Van Houe, sculp.
	1693	NONE.	Book of Common Prayer (Illustrated) Cambridge University Library (46, 1, 13).
	1695	NO INDICATION.	Bp. Patrick's Book for Beginners. (C. W.)
	1695	UNLIT. NONE.	'In some topping churches . . . but the meaner churches are forced to shift without them.' Note, upon Bp. [Burnet] of Salisbury's Four Discourses p. 25.
	[1695		[At Rouen . . . (channel of cathedral customs to Lincoln, &c., from Bayeux) no candlesticks on high altar or retable; but tapers on brackets held by figures. De Moleon, Le Brun Desmarets, Voyages Liturgiques, Paris, 1718, p. 275.]
	1698	LIGHTED.	Holidays of the Church of England, by W. Brough, 12° printed by Keble (same plate as 1719). Interior of Saint Paul's.
	1700	NONE.	The Divine Banquet, printed by N. Crouch (Chambers, p. 373).
	1707	UNLIT.	'Blind lights' among the English characteristics offensive to Scottish Presbyterians, in Lawful Prejudices against Scottish Union, 4° Edinb. (Lathbury, Common Prayer, p. 427).
	1709	NONE.	Book of Common Prayer (illustrated). F. Bochard inv. Printed by Hills (Chambers, p. 97).
	1710	[CANDLES?	'These Lights us'd time out of Mind in the Church are still continued in most, if not all, Cathedral and Collegiate Churches and Chappels, so often as Divine Service is perform'd by Candle-light, and ought also by this ["Ornaments"] Rubrick to be us'd in all Parish Churches and Chappels.' Wheatley's Ch. of England Man's Companion, or A Rational Illustr. ii. 4, vi. 1722, ed. 4, 8° p. 109.
	1710	LIGHTED.	Queen Anne 'and both Houses of Parliament in St. Paul's Dec. 31, 1706,' large engraving by Trevill, one of the tapers shown, lighted, [anthem] being performed with orchestra, preacher in pulpit. (L.L.)

1712	CANDLES.	'Candlesticks' among Church ornaments, Prideaux's Directions to Churchwardens, p. 36.
1714	[CANDLE?	To be lighted whenever service is performed by candlelight.] The picture (by M. Burghers) in this edition shows no candlesticks at the Holy
	NONE.	Communion. Wheatley, Ch. of Engl. Man's Companion, &c., ed. 2, 8°, Oxford pp. 88, 89. (C. W.)
1717	NONE.	The Whole Duty of Receiving Worthily, ed. 5. (Chambers, p. 404).
1717	NONE.	Book of Common Prayer, engraved throughout by J. Sturt. (C. W).
1717	LIGHTED.	'The House of Prayer,' Patrick's Devout Christian, ed. 14. (C. W.) See 1684.
1719	LIGHTED.	Interior of St. Paul's Cathedral. The Holidays of the Church of England. By W. Brough, Dean of Gloucester. (Chambers, p. 286) [*sup.* 1698] printed by Keble.
1720	[CANDLES?	'Whenever service is perform'd by candle-light,' see 1710.]
	NONE.	A new frontispiece (Holy Communion) Wheatley's Rational Illustration (enlarged ed.) folio (? St. John's Coll. Camb.).
1726	LIGHTED.	The Orthodox Communicant, J. Sturt, sculp. (Chambers, p. 285[b]). [*Obs.* An emblematical picture.]
1728	LIGHTED.	Magdalen College Chapel, Oxford, translation of Burnet De Statu Mortuorum, ed. 2, M. Burghers, sculp., Is. Fuller 'Pinxit ad Alt[are]' (Chambers, p. 290).
1731	LIGHTED.	An Altar at the back of the scene of the Institution of the Last Supper (our Lord with the Apostles sitting at another Table) showing association of ideas at this period. Bp. Patrick's Christian Sacrifice, ed. 17. (Chambers, p. 230).
1736	[IN WINTER.	'In winter from All Saints to Candelmas the choir [of York Minster] is illuminated at every service by seven large branches' and candles at stalls. 'These, with two large tapers for altar, are all the lights commonly made use of.' Drake Eboracum, p. 524.
1737	LIGHTED.	St. Paul's Cathedral. La Communion des Anglicans. Picart Rel. Ceremonies, English translation, vol. vi. p. 79. In the original edition, Amsterdam 1736, iv. p. 89, it is not so evident

1890			that the candles are lighted. J. V. Schely del. et fecit 1736.
READ v. BISHOP OF LINCOLN.	1750	CANDLES.	Silver gilt candlesticks in Gonville and Caius College Chapel, Cambridge. Blomefield, Collectanea Cantab. p. 101.
LIGHTS.	1759	NONE.	Liturgia (Latin Prayer Book), ed. 7. (B. M.).
	1770	NONE.	Guide to the Altar. (Gwin delin. Benow sculp.).
	1774	NONE.	Book of Common Prayer, picture 1. Wright and Gill, Acad. Oxon. (Chambers, p. 129).
	1775	CANDLES.	Canterbury Cathedral. Hasted's History of Kent, p. 527.
	1780	CANDLES.	Sam. Parr, D.D., at Asterby, Lincolnshire. 'The stranger would estimate his piety by the length and diameter of his wax candles and the weight of his communion silver.' Facetiæ Cantab., p. 132.
	1788	CANDLES.	Plan and Section by Soc. of Architects, The Builders' Magazine. (Ernest Geldart).
	1807	CANDLES.	Westminster Abbey, Malcolm's Londinium, i. 87.
	1807	CANDLES.	St. Paul's, Malcolm's Londinium, iii. 145 (given 1699).
	1821	NONE.	(A minutely coloured picture.) Coronation of King George IV., printed for D. Walther (Soc. of Antiq.).
	1825	CANDLES.	Chancel of St. Peter's in the East, Oxford (scene, a wedding), J. P. Neale inv.; Le Keux's Churches, vol. ii. No. 6.
	1826	UNLIT.	At Communion. The Abbey Church, Shrewsbury, drawn by J. P. Neale, etched by J. Tingle. Le Keux's Churches, vol. ii. No. 18.
	1840	? NONE.	St. John's College, Cambridge. Starling and Le Keux. [Were lighted on surplice evenings until 1846].
	1842	CANDLES.	Magdalene College, Cambridge. Le Keux's Memorials.
		NONE.	(No candles at Catherine Hall, or in Barnwell Church. Ibid).
	1847	UNLIT.	In twenty (? 21) of the thirty-four pictures in The Altar, or Meditations in Verse, candles are shown — in thirteen no candlesticks [by Is. Williams, B.D., lithographs by Mrs. Williams].
		NONE.	

SUMMARY FROM TEXTS AND ENGRAVINGS INDICATING USAGE AS TO LIGHTS.

BEFORE REFORMATION Lights on Altars common, not universal (a Light before Sacrament universal).

In **1547-8** all Lights in Churches were ordered to be put out, except two to be retained upon the altar, by Royal and Episcopal Injunctions.

In **1549-51** certain Articles (wanting authorisation), and Bishops Ridley and Hooper order the putting out of those two lights; not known to be further ordered or done.

[PHILIP AND MARY.]

1558-1610 Candlesticks remain in many places and gradually disappear in most. Candles at first lighted, and then not, in the Queen's Chapels.

1621-1641 Candles apparently general, and lighted in many places, "Chapels, Colleges, Cathedrals."

[COMMONWEALTH.]

1660-1678 Candles apparently common, not universal and no account of lighting.

1681-1737 Independent evidences of *Lighting* in eleven *or* twelve *cases.*

De Laune, Hickeringill in 1681, Communicant's Guide, Addison, Loggan, William III. Coronation, Queen Anne at St. Paul's in 1706 [Christian's Manual, same as Addison; Brough, same as De Laune, above], Bishop Patrick 1717, Bishop Patrick 1731 (another picture), Orthodox Communicant, T. Burnet, ? York, Picart.

" " *None*, or *Unlit*, or *Lighted only for light*, in fourteen *or* fifteen *cases.*

Smythies, C.P.B. Plate 1684, Patrick 1684, ? Addison, James II. Coronation, Hickeringill in 1689, C.P.B. Plate 1693 [? Christian's Manual, same as Addison, above], Notes on Bishop Gilbert Burnet, Divine Banquet, Lawful Prejudices, C.P.B. Plate 1709, Wheatley (text and in 1714 picture), Whole Duty of Receiving, C.P.B. Plate 1717, ? York.

1750-1847 *None* are shown in eight cases.

Liturgia, Guide to Altar, C.P.B. Coron. Geo. IV., Le Keux's St. John's Cambridge, Catherine Hall, Barnwell, Williams' Altar [thirteen illus.].

" " *Candles* are shown in eleven cases.

Caius, Canterbury, Dr. Parr, Builders' Mag. in 1788, Westminster, St. Paul's, St. Peter's Oxford, Magdalen Cambridge, and St. John's (1846).

One picture of Communion at Shrewsbury with candles unlit, and [twenty or twenty-one illus.] in Williams' Altar.

MORE BRIEFLY—

Before the Reformation Lighted Candles on Altar common, not universal.

1547 and **8** two ordered.

1549-1551 were prohibited by some Bishops, but not everywhere done away with.

1558-1610 the Lighting ceased to a great extent, and the candles themselves in many places.

1621-1641 Candles were general, and in many places lighted.

1660-1680 Candles were common; no account of their being lighted.

1683-1737 almost as often lighted as not.

1737-1750 no evidence before us.

1750-1847 the lighting seems to have gone out.

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POSITION OF CELEBRANT.

POSITION OF CELEBRANT.

TEXTS AND ENGRAVINGS ILLUSTRATING POSITION OF CELEBRANT.

(END is used for distinctness, meaning a SHORT SIDE).

1547-1640	('ALTARWISE.')	The 'altarwise' position of tables 'hath continued in royal chapels of three famous and pious princes and in most cathedrals, and *some* parish churches. Canon vii. A.D. 1640. Cardwell Synod. p. 404.
1552	EASTWARD [CENTRE.]	Book open on desk on altar with two lights. Tynedale's New Testament (Rev. xi.) printed by Jugge (Lambeth Libr.).
1560	(CHURCH.) (CHANCEL.) ('ALTARWISE.') ('TABLEWISE.')	'The table standeth in the body of the church in some places:—in others in the chancel. In some places altarwise distant from the wall. . . . In some other in the middle of the chancel, north and south.' Strype's Life of Parker, p. 152 (ed. 1711).
BEFORE 1560	? EASTWARD.	Dean of Bocking charges ministers in his Peculiar 'not to turn their faces to the high altar in service-saying, which was a new charge and not delivered before.' (May refer to Morning and Evening Prayer. Abp.'s decision not reported.) Strype's Parker, Bk. ii. ch. 19; pp. 152, 153 (ed. 1711).
1570	NORTH LONG SIDE. NO INDICATION.	Holy table lengthwise. Foxe's Acts and Mon. B. ix. No book or cushion. Two flagons on the floor. 'The Cōmunion Table,' with round loaf and cup, stands lengthways between font and pulpit.—Foxe's Acts and Monuments, p. 1178.
1580	('TABLEWISE.') ('ALTARWISE.')	Holy table commonly lengthwise in parish churches: in chapels royal and cathedrals 'altarwise.' See order of March 1, 1641, 'for the greater part of these threescore years last past' (Journals Ho. of Lords).
1616-17	(RAILS, &c.).	Dean and Chapter of Gloucester remove the table then standing 'almost in the middest of the quire,' so as to rail it in at east, as it was 'in His Majesties chapel and all the cathedral churches which [Laud] had seen.'—Heylin, Cyprianus Anglicus, pp. 63, 64, 274.
1619-26	NORTH END.	L. Andrewes, Bishop of Winchester (Works xi. 150); 'If both [Ministers be] priests, the one at one end, the other at the other.' Cushion on altar and kneeling-stool. (Prynne Canterb. Doom 123).

1621-33	NORTH END.	Laud's chapels at Abergwilly, London, Lambeth; —cushion and kneeling-stool. (Prynne ut sup.).
1625-1630	EASTWARD (CONSECRATION.)	For these few years (not so far as he remembers from 1630 onward) Dr. Cosin says 'he might haply do as others did before him . . . step to the former part [of the table, at Durham Cath. 7 ft. long,] to consecrate and bless those elements which otherwise he could not conveniently reach.' Ans. to Art. 2, Lords Journ.' May 24, 1642.
1627	NORTH SIDE.	Bishop Williams of Lincoln, letter to the vicar of Grantham, 'This table is not to stand altar-wise, and you at the north-end thereof, but table-wise, and you must officiate at the north-side of the same, by the liturgy.'—Holy table, Name and Thing, printed for the diocese of Lincoln 1637, p. 20 (date of letter, p. 7).—Hackett's Life of Williams, vol. ii. p. 101. Bp. Williams 'does not believe that ever the communion tables were (otherwise than by casualty) placed "altar-wise" in country churches.' . . . 'The rubric implies the end to be placed towards the east great window.' . . . 'This . . . not new . . . in the Queen's time but practised in King Edward's reign . . . and so used at this day in most places in England.' Letter, p. 15.
1627	NORTH SIDE.	'Doth [your parson] stand at the north side of the table, and performe all things there, but when he hath speciall cause to remove from it. . . . ? Draft of Visitation Articles by Dr. Cosin as Archdeacon of East Riding. Surtees 52, p. 118, and compare works, v. 2, p. 8.
1628	NORTH SIDE.	'Our Communion table must stand as it had wont to doe in the midst of the quire: not at the east end, as farre as possible from the people, where no part at all of evening prayer is ever said. . . . Neither must the table be placed along from north to south, as the altar is set . . . otherwise the minister cannot stand at the north side, there being neither side toward the north. And I trow that there are but two sides of a long table, and two ends: making it square, and then it will have foure sides and no end, or foure ends and no side.'—p. 33. 'The Lord's table I say eleven years ago was turned into an altar, and so placed that . . . there is no side of the table standing *northward*.'—Sermon in cathedrall church of Durham, July 7th, 1628, by Peter Smart. Printed 1640. (Cambridge University Library, 47 : 5 : 93), p. 36.

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1629–1642	NORTH SIDE.	Dr. Cosin 'constantly stood at the north side or end of the table to read and perform all parts of the Communion Service there' these 12 years. (See 1625.) Lords Journal, May 24, 1642.
1630		'This altar . . . is placed at the end of the quire along by the wall with neither side toward the north . . . and that the minister should stand at the north syde of the table, which cannot be done when neither syde of the table standeth northward.' Articles or instructions for articles to be exhibited by His Majesty's High Commissioners against Mr. John Cosin, &c., Durham. Surtees Soc., vol. 52, Cosin Corresp. ii. p. 169.
1633	(RAILS, &c.)	(November 3.) Order in council confirms action of ordinary in removing table in St. Gregory's church (St. Paul's Churchyard) close to east wall of the chancel.—Cyprianus Anglicus, p. 245.
1633	(BODY OF CHURCH.)	(December. Bp. Williams, having previously ordered the vicar, &c., of St. Martin's, Leicester, to rail in the table, now gives permission to remove it into the body of the church. But at Bugden at Lincoln, and Westminster, he has the altars against the east wall. (Cp. Pocklington, Altare Christianum, 1637, p. 87.)
1634	(RAILS.)	Abp. Laud, visiting (Bp. Williams' diocese) orders rails throughout Lincoln diocese. And so throughout the province (1634–5).—Heylin. Cypr. Angl., 271.
1635	"	A four-square rail, away from the wall, erected in Lyddington Prebendal Church (Bishop Williams' 'half-compliance;' Cypr. Angl. p. 271).
1635	(CHANCEL.)	In Diocese of Bath and Wells, after Bp. Pier's injunctions, only 140 Churches have table railed-in at East.
"	(BODY OF CHURCH.)	In Diocese of Bath and Wells 469 Churches (out of 609) have table in nave. Cypr. Angl. pp. 272, 273 (ed. 1671).
1636	EASTWARD (CONSECRATION.)	Bp. Wren, at Norwich, places 'the communion table altar wise,' and consecrates 'the bread and wine at the west side of the table.'—Cypr. Angl. p. 442. Also Articles of Impeachment (1641), p. 6. In his notes (Fragm. Illustrations, ed. Jacobson) Wren begins service 'at the north of the table.' For consecration, standing before the table shall so order and set the bread and the
	NORTH END.	

		wine, that, while he is pronouncing the following collect, he may readily take the bread,' &c. 'When the distribution is ended, the priest standing at the table as he did at first,' pp. 74, 83.
1637	NORTH SIDE.	Prynne. 'Rubrick clearly determines* that table ought to be situated table-wise with the sides or longest squares of it north and south. The narrowest square an end not a side. North side must needs be interpreted long side.' Admit; that east wall is to be 'perpendicularly over;' table, yet this must be interpreted 'over the east end of it next to the east wall.' Quenchcoal, or Brief Disquisition, pp. 169, 174. Holy Table, Name and Thing (Bishop Williams) 'endwise to the wall' p. 42, 'endlong' p. 45, 'endwise above the steps.'
1640	NORTH SIDE OR END.	'Concerning parishioners—9. The minister standing as he is appointed (in marg. rubr.) at the north side, or end of the table when hee prepares to celebrate the holy communion, and calling on those who do intend . . .' Vis. Artt. Bp. Juxon [Rit. Com. 592].
1640-41 1 March.	(TABLEWISE.)	Bishops to 'give directions that the communion table in every church' stand table-wise. Lord's Journal.
1641	(BODY OF CHURCH.)	(Sept. 8). Order of commons in parliament that churchwardens remove tables from chancels, and take away rails, tapers, candlesticks, and basons. Rushworth's Collections, iv. 386.
1642	EASTWARD. (NOT PROVED.)	Dr. Cosin and certain others, when they administered the communion 'stood at the west side of the table, with face toward the east.'—A catalogue of Durham Innovations, pp. 26, 30. (See Hierurgia Angl. p. 363. But see above, A.D. 1625.)
1643	NORTH END.	Book open on table at Peterborough, view of 'the old altar-piece' as it was before it was 'beaten down by the souldiers.' — (See engraving in Gunton's Peterborough, p. 334).
1645	(BODY OF CHURCH.)	(*Note*, from 1645 till about 1662, the 'Directory for the Public Worship,' &c., ratified by parliament, places the table conveniently, as in Scotland 'that communicants may sit about it or at it.'
1647	NORTH END.	Book open on cushion, for southward use. The Hive of Devotion (Emblème 3: Frequenting of the Sacrament').—A translation by R. B., fellow

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		of Trin. Coll. Cam., for Arabella Countess of Nottingham; from Hieron. Drexelii Zodiacus Christianus. (The Latin, 1632, has a different picture). Br. Mus.
1657	'EASTWARD.	Book open [no cushion]. Sparrow's Rationale, Hollar's print. (Rev. C. Wordsworth.)
1659	'NORTH SIDE.'	'. . . standing at the north side of the table . . this seemeth to avoid . . . the popish practice. 'MS. collections of a learned man,' quoted by Hamon L'Estrange, Alliance, vi. d. (ed. 1690).
1660	EASTWARD.	South part (? reversal in printing), open eastward Sparke's Scintilla altaris, ed. 2 (Br. Mus., Lambeth) 1663, ed. 3 (Br. Mus., Lincoln).
1661	EASTWARD.	Book open eastward, no cushion. Sparrow's Rationale, ed. 2, Hollar's print (Br. Mus., Lambeth).
1661	NO INDICATION.	Altar with dish and chalice; ends railed off inaccessible. The tent above it opened by angels. Jer. Taylor's Worthy Communicant, ed. 1. *Obs.* A mystical representation. Ed. 5, 1670 (C. W.) Ed. [6], 1671 (Br. Mus.).
1662	EASTWARD. 'BEFORE.'	Two large cushions for use in front. 'The Abp. of Canterbury came out of the north-door of Saint Edward's Chapel, vested in a . . . cope. The third prayer being ended, the said abp. standing before the altar began the Versicle, "Lift up your hearts." The archbishop having left (being aged) the Bishop of London went up to the high altar and began the "Communion"' (i.e. administration) Coronation of Charles II. (engraving by Hollar) pp. 176, 184. (Soc. Antiq.).
1662	NORTH SIDE OR END.	'Concerning parishioners—9. The minister standing as he is appointed (in marg. rubr.) at the north side, or end of the table, when he prepares, &c., verbatim as Bp. Juxon, 1640. Vis. Artt. Archdn. Pory (Rit. Comm. 629). Original 4°, Br. Mus.
1662	(NO DIRECTION.)	Visitation articles of eighteen bishops, six archdeacons (i.e. all extant exc. Pory's), make no reference to position. (Rit. Comm. pp. 601–615–631).
1662–1730		No further reference in Visit. Artt. (Rit. Comm. pp. 631–685).
1664	EASTWARD.	Book open eastward, Sparrow's Rationale, ed. 3, Hollar's print, same as 1655 and 1661 (Mr. H. H. Gibbs).
1664	EASTWARD.	1st edition of *Ἐνιαυτός*. See below, 1674.

166[5]	North Side cp. 1662.	Archdn. Pory's revised artt. Printed R. Royston 166 . 'The minister standing as he is appointed (in marg. rubr.) at the north side of the table when he prepares, &c.' (Brit. Mus. date in catalogue 166[5]; revised throughout.)	1890 Read v. Bishop of Lincoln.
1666	Eastward.	Book open eastward on cushion (perhaps centre). Sparke's Scintilla Altaris, ed. 4, p. 316, a new engraving: [the cut numbered '1' may have belonged to some other book.] (Rev. B. Moultrie) ed. 5, 1673; ed. 6, 1678; ed. 7, 1682 (Br. Mus.)	Position of Celebrant.
1668	Eastward.	Book eastward. Rationale by A. Sparrow (see 1657) 'now Bp. of Exon.' (Br. Mus., Rev. C. B. Hutchinson). Ed. 1676. 'now Bp. of Norwich' (Br. Mus.). Ed. 1684 (Br. Mus., C. W.); 1704. 1717; 1839. (These editions, from 1668, have fresh engraving, not by Hollar, of interior of a church.)	
1674	Table Lengthwise.	Picture of 'The Lord's Supper.' One minister in centre looking south, the other opposite him looking north, 'to avoid the popish superstition of standing towards the east.' Ἐνιαυτός, ed. 2, p. 276. (A curious catechetical work, based on Prayer Book, partly designed for use of conforming Covenanters.)	
	Eastward.	Another picture in Ἐνιαυτός, represents the 'Lord's Prayer.' Table here altarwise; book on cushion eastward (the same as in Sparke's Scintilla, 1666–82), p. 218. (Sion College, Bodl. B.M.)	
1674	Eastward, North of Front.	'Domus Orationis,' through an open door. Dish in centre, flagon on either side. On cushion an open book towards northern part of long side, for use in front. Book of Common Prayer, Lond. fo. King's Printer, J. Bill, &c., on copper, D. Loggan, sculp. (Br. M.).	
1675	Eastward, [Centre.]	Book on cushion. Woodcut 2, in small Prayer Bk. (assigns of Bill and Barker). Design as above after Hollar.	
1676	North End.	Book on desk. Comber's Companion to the Temple. Part II. ed. 1; ed. 2, 1679. For H. Brome. (See 1677.)	
1677	North End.	Book on desk. Herne's Domus Carthusiana (Lambeth). For H. Brome. Same plate as in Comber, with date accommodated.	
1678	North End.	Frontispiece 'newly design'd' to Prayer Book. Book lying upon the table. Bill, Barker, Newcomb, and Hills (C. W.).	

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1681	EASTWARD, NORTH OF FRONT.	Interior St. Paul's. Celebrant's book on cushion northern part of front, eastward; epistoler's book at S.W. angle, diagonally; both closed. A third volume (qu. Great Bible) stands upright closed between the lights. The present State of London, T. De Laune. (See Chambers, Div. Worship, p. 286). Ed. 2, Ed. 2, 1683.
1682	NO INDICATION.	The Communicant's Guide. (See Chambers, p. 402*a*.)
1683	NORTH END, EASTWARD [CENTRE.]	Edward VI. at communion. Bishop kneels at north end; another book closed, eastward centre. (Not an actual scene. Note rails, and pendant of Cranmer, Ridley, and Latimer, suffering together before Q. Mary.] Burnet Reformation, part 2.
1683	NO INDICATION.	The Unworthy Non-communicant. Flagons at either end. (B. M.)
1684	EASTWARD [CENTRE.] (Litany book only.)	Prayer Book. Same design, but enlarged and slightly altered from that of 1678; the position of the book is here altered to eastward for Litany. (See Chambers, p. 209.)
1684	EASTWARD [CENTRE.]	Comber's Short Discourses on the Whole Com. Prayer. Minister in surplice scarf and hood kneels eastward before altar of burnt offering Emblematic. 'I. Collins, sculp.' (C.W.)
1685	NORTH END.	One cushion and book. Sandford's Coronation of of James II. (L. L.).
[1686	NORTH END.	Date of publication of Gunton's Peterborough. Imprimatur Apr. 20, 1685. The scene belongs to 1643.]
1686	EASTWARD, NORTH. OF FRONT.	Celebrant kneeling in front, facing towards centre. Book open on cushion. The Divine Banquet. Other edd. 1696, 1700, 1724. (With Imprimatur of Compton, Bp. of London). See Chambers, p. 373. (Brit. Mus.)
1687	NORTH END *and* EASTWARD [CENTRE.]	One cushion, with nothing on it, north end. On another, an open book, eastward, central. At the southern end are sceptres. Sandford's Hist. of the Coronation of K. James II. S. Moore del. et sculp. (Lamb. Soc. Ant. Br. Mus.)
1688	NO INDICATION.	Chapel at Peterhouse, Cambridge. D. Loggan.
1869	NO INDICATION.	Engeland Beroerd (Coronation of William III.) (H. H. G.)
1693	NO INDICATION.	The Christian's Manual, ed. 4 (three pictures). (B. M.)

1693	EASTWARD, NORTH OF FRONT.	Common Prayer Book. C. Bill, &c., R. White, sculp. (Camb. Univ. Libr. G. I. 13.) 'Domus Orationis' as 1674.
1693	NO INDICATION.	Addison's Introduction, ed. 4. 1719, ed. 5. (Chambers, pp. 292, 402*b*.)
1697	[EASTWARD] NORTH OF FRONT.	The celebrant stands somewhat to front (not end) northern part, turned rather to end and centre; the book similarly. After communicants have 'drawn near'; before consecration. Bp. Patrick's Book for Beginners. [Ed. 13, 1695 (C. W.).] Ed. 14, 1697; ed. 17, 1713; ed. 19, 1743. (Br. Mus.)
1698	EASTWARD, NORTH OF FRONT.	Interior of St. Paul's; all as in De Laune, 1681. [Brough's] Holidays of the Church of England. See 1719.
1700	EASTWARD, [CENTRE.]	Sparke's Scintilla, ed. 8. For Litany book open on ? desk on table in front. No faldstool (new engraving P. Bouche.).
1704	? EASTWARD, NORTH OF FRONT.	'Form of [private] prayers used by K. William III.' Bp. celebrant standing at n. part of w. side, with book in hands, half turning to the king, who kneels at the rails (L.L.).
1708	NORTH END.	Nicholls on the Common Prayer, ed. 1. "'Tis quæried by some, whether the priest is to say the Consecration Prayer standing before the table . . . or to return to the usual place of saying the Communion Service with us, viz., to the north side of the table.' The author argues for 'the north side' (or end). 1712, ed. 2 fol. Bonwicke, &c. (C. W.)
1709	EASTWARD, [CENTRE.]	Book open on cushion on table; another on faldstool for Litany. A new engraving of Hollar's subject, but entirely fresh treatment. F. Bochard, inv. Book of Common Prayer, plate 12. Hill, Queen's printer (Chambers, p. 97.)
1710	NORTH END.	Wheatly's Rational Illustration, ed. I., Oxon.
1714	NORTH END.	Celebrant standing at north end facing southward; book on cushion under his left hand, paten under his right. M. B. [urgers] del. et sculp. Wheatly's Church of England Man's Companion, or a Rational Illustration, ed. 2, Oxford, 8°. The author argues that the table must not stand in the body of the church, for how could he turn himself to the people? Also that he must stand 'on the north side and look southward . . . to avoid the

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		practice of the Romish Church,' p. 179; and not 'hinder the people from seeing,' p. 197. (C. W.) See infra 1720.
1716	? INDICATION.	No room at south end because of rails. North end hidden by pulpit. Liturgia, Tho. Parsell, ed. 2, (B. M.)
1717	EASTWARD, SOUTH OF FRONT. (after consecration.)	Book open on cushion eastward, slightly south of centre. The Whole Duty of Receiving Worthily ed. 5. (Chambers, p. 404.)
1717	EASTWARD, [CENTRE.]	Open book between chalice and flagon. Prayer Book engraved by Sturt, with Baskett's (King's Printer) permission. Dedicated to the King, and Prince and Princess of Wales. (C. W.)
1719	EASTWARD, NORTH OF FRONT.	Interior of St. Paul's; as in edition 1698 [Brough's] Holidays of the Church of England. (Chambers, p. 286.)
1720	NORTH END.	Wheatly's Rational Illustrations, ed. 3, folio, Lond. His argument as in 1714; only he omits what he had said about avoiding Romish practice, and adds "Bishop Beveridge has shown [Pandect II. p. 76, § 15. See also Renaudot, Liturgies, ii. p. 24] that wherever in the ancient Liturgies the minister is directed to stand before the altar the north side of it is always meant," &c. Cap. VI. Sec. 1 § 4. Also Sec. 22 § 6. [*Obs.* The references to Beveridge and Renaudot are misleading. Nothing of the kind is attempted to be shown. Frontispiece enlarged by Van der Gucht from Burghers 1714. (S. John's Coll., Cam. P. 4, 23.). 'If it be ask'd, whether the priest is to say this prayer standing before the table, . . . I answer at the north end of it.' (*Ibid.*)
1726	EASTWARD, [CENTRE.]	A large book, between the lights, on a desk, open eastward. The Orthodox Communicant, engraved by J. Sturt. Something like his smaller engraving of 1717, but this one is emblematic. (Chambers, p. 285, *b.*)
1727	NO INDICATION.	Book upright eastward. Minister in prayer desk, people kneel eastward in chancel. Closed book on table upright on cushion central. New Exposition of Com. Prayer. J. Veneer, Chichester: Van der Gucht, fecit.
1728	EASTWARD, NORTH OF FRONT.	Interior Magd. College Chapel, Oxon. Celebrant's book closed at northern part of the front, epistoler's book at southern part, both as for eastward use. Engraving by M. Burg[hers], from picture by

		Fuller ('pinxit ad Alt[are]'). Burnet's State of the Dead, translated by M. Earbery, ed. 2 (Chambers, p. 290.) Altar draped in such a manner as prevents approach at end.
1731	EASTWARD, [CENTRE.]	An open book on a desk between the lights. This is upon an altar at the back of the scene of the Institution of the Last Supper (our Lord with the apostles sitting at another table). Showing the association of ideas at this period. Bp. Patrick's Christian Sacrifice, ed. 17, Wood, &c. (Chambers, p. 230.)
1736, 7	NORTH END.	La Communion de Anglicans à Saint Paul; Cérémonies, &c., de tous les Peuples B. Picart, t. v. p. 89. 'I. V. Schely del. 1736.' Amsterdam. London, 1737.
1770	NO INDICATION.	Guide to the Altar. Only a flagon on the Table.
1774	EASTWARD, [CENTRE.]	Book open on a cushion eastward. Illustration No. 1 in Book of Common Prayer, for Wright and Gill, Oxford. This is like the picture in Sparke's Scintilla (1666–1682), but is newly cut, showing both ends of a short altar, and the book at the centre. (Chambers, p. 129.)
1813	NORTH LONG SIDE.	Litchet Maltravers. 'The communion-table is set the longest way, from east to west.' Hutchins, Dorset, iii. p. 23, ed. 2 (ed. 3, vol. iii. p. 332, says, 'was formerly' set so.)
1818	EASTWARD, (CONSECRATION.)	Practice of Bp. Legge of Oxford. See The Position of the Celebrant by Morton Shaw, ed. 2 (1875), p. 153.
1821	EASTWARD, [CENTRE.]	Chair at northern end, but a kneeling stool in front only. Coronation of King George IV. For D. Walther (Soc. Antiq.).
1826	EASTWARD, NORTH OF FRONT.	Celebrant's book eastward, northern part of front. Epistoler's book at south end, facing northward. Larger book in centre between candles. All books closed. The table with cup ready for Holy Communion. Interior of Abbey Church, Shrewsbury. Drawn by J. P. Neale, etched by J. Tingle. Le Keux's Churches, vol. ii. No. 13.
1830	NORTH END.	Interior of Hereford Cathedral (stool at each end). A. W. Pugin's Contrasts (ed. 1836). Plate 1.
1831	EASTWARD, NORTH OF FRONT.	Bp. Maltby's practice. North side (*not* end) at beginning of service. Front centre for consecration. (Guardian, July, 1873, p. 923, *a*.) Rev. W. Burkitt, ap. Morton Shaw On Position of Celebrant, 1875, pp. 153, 154.

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1847	NORTH END.	—up to the offertory (nine pictures).
	EASTWARD CENTRE.	—from the offertory onwards (sixteen pictures). The Altar: or Meditations in Verse [by Is. Williams, B.D.].
1857	NORTH LONG SIDE.	Langley, Salop. Holy table lengthwise. Anastatic Soc., 1857, plate xxxvi.—In Bloxam Companion, 1882 (pp. 175, 178) the table is set north and south.
1863	NORTH LONG SIDE. (LENGTHWISE.)	S. Bartholomew's Hospital, Sandwich. Holy table lengthwise. 'Was being used for hats, &c. . . . . objected to leave their pews and to kneel at reception.' Rev. D. Bruce Payne, Chaplain. Guardian, 1890, p. 408, col. *c*; p. 1556, *a*.

Proctors for Promoters: *Wainwright & Baillie.*

Proctors for Bishop of Lincoln: *Brooks, Jenkins & Co.*

E. S. R.

Nov. 11; *Dec.* 16.

THE UMBILO.

Admiralty—Limitation of Liability—Gross Tonnage—Navigation Spaces—The Merchant Shipping Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*The Merchant Shipping* (*Tonnage*) *Act,* 1889 (52 & 53 *Vict. c.* 43), *s.* 3, *sub-ss.* (*b.*), (*i.*), (*ii.*).

In an action for limitation of liability, the owner of a steamship, in calculating the gross tonnage upon which his statutory liability in damages—under s. 54 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), —is based, cannot deduct the navigation spaces mentioned in s. 3, sub-ss. (b), (i.), (ii.), of the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43).

ACTION for limitation of liability on behalf of the owners of the registered British screw steamship *Umbilo.*

The facts, so far as material on the question of the deduction of navigation spaces, in calculating the gross tonnage of the vessel, were as follows:—

On June 24, 1890, a collision occurred between the plaintiffs' steamship *Umbilo* and the barque *Ethel,* in which collision the latter vessel was sunk, and two of her crew and a passenger on board of her, and a passenger on board the *Umbilo,* lost their lives. On June 25, the defendants, the owners of the *Ethel,* and her master and crew, and the owners of her cargo, commenced an action for the recovery of damages occasioned by the collision.

The owners of the *Umbilo* admitted that, without their actual

fault or privity, the collision was caused by the negligence of those on board their vessel, and, as plaintiffs in the present action, sought for a stay of all further proceedings (other than a claim for loss of life or personal injury) upon payment into Court, with interest from the date of the collision, of the sum of 14,777*l.* 8*s.* 9*d.*, being 8*l.* per ton, calculated under s. 54 of the Merchant Shipping Amendment Act, 1862 (1), on 1847·18 tons, the alleged gross tonnage of the vessel without deduction on account of engine room.

The copy of the register, as verified by affidavit, shewed the gross tonnage of the vessel to be 1922·82 tons, and the plaintiffs arrived at the figures 1847·18 tons by deducting 75·64 tons, being 60·86 tons crew space and 14·78 tons navigation space.

The last-mentioned deduction was made under the Merchant Shipping (Tonnage) Act, 1889, s. 3, sub-ss. (b), (i.), (ii.) (set out in the judgment), and consisted of 5·14 tons master's room, 3·73 tons chart room, and 5·91 tons boatswain's store room.

The defendants, at the hearing, did not dispute that the plaintiffs were entitled to the deduction for crew space, but they objected to the deduction of 14·78 tons navigation space, on the ground that this allowance, under the Merchant Shipping (Tonnage) Act, 1889, is for the purpose of ascertaining the register tonnage of the vessel, and has nothing to do with the computation of the gross tonnage upon which the statutory liability of the owner is based.

Lauriston Batten, for the plaintiffs.

Butler Aspinall, for the defendants.

The arguments of counsel sufficiently appear from the judgment. The following cases were referred to: *The Franconia* (2); *The Palermo.* (3)

Cur. adv. vult.

1890. Dec. 16. SIR JAMES HANNEN, President (after stating the nature of the action, continued):—The question is what

(1) 25 & 26 Vict. c. 63, s. 54:—"The owners of any ship . . . . shall not . . . be answerable in damages . . . in respect of loss or damage to ships, goods, merchandize, or other things . . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be . . . in the case of steamships, the gross tonnage without deduction on account of engine room."

(2) 3 P. D. 164.

(3) 10 P. D. 21.

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deductions should be made from the gross tonnage of the *Umbilo* in computing the amount to which the plaintiffs' liability should be limited.

By the Merchant Shipping Act of 1862, s. 54, it is enacted, that the estimated tonnage is to be, "in the case of steamships, the gross tonnage without deduction on account of engine room."

It was not disputed that the plaintiffs were entitled, in computing the gross tonnage of their vessel, to deduct the space solely appropriated for the berthing of the crew; but the plaintiffs further contended that they are entitled to certain other deductions under the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43.)

By s. 3 of that Act, it is enacted that, "In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage:

"(b), (i.) Any space used exclusively for the accommodation of the master.

"(ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation, and boatswain's stores; and (iii.) . . . ."

For the defendants, it was argued that this enactment did not apply to the computation of the "gross tonnage" upon which the liability of the owner is based, and it appears to me that this argument is well-founded.

By s. 1 of the Act of 1889, it is enacted that, "In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been first included in the measurement of her tonnage"—that is, in her gross tonnage; but, as I have already pointed out, that gross tonnage affords the measure of the shipowners' liability. The deductions claimed by the plaintiffs must, therefore be reduced by 14·78 tons.

Solicitors for plaintiffs: *Waltons, Johnson, & Bubb.*
Solicitors for defendants: *Botterell & Roche.*

T. L. M.

THE ASIA.

1890
Dec. 9.

Admiralty—Collision—Practice—Action in High Court proper to be tried in County Court—Costs—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* (3), *and s.* 9.

In the absence of special circumstances justifying proceedings in the Admiralty Division of the High Court, a plaintiff will not be allowed costs when, in an action of damage by collision, although he claims more, he does not recover an amount exceeding 300*l.*, that being the limit of the County Court jurisdiction under s. 3, sub-s. (3), of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).

MOTION by plaintiffs, in an action of damage by collision, to confirm the registrar's report and condemn the defendants in the costs of the action and of the reference.

The facts, so far as material on the question of costs, were as follows:—

On September 15, 1890, the plaintiffs' fishing smack *Oswald Tomlin* was lying hove-to in Sea Reach in the River Thames, when she was run into and sunk by the defendants' screw steamer *Asia*, the two hands, of which the crew on board the smack consisted, saving themselves in their boat. On September 19, an action of damage was commenced by the plaintiffs against the *Asia* in the sum of 500*l.*, and the vessel was arrested; but on the defendants appearing, and, by their solicitors, undertaking to put in bail to that amount, the vessel was released. On September 29, the defendants admitted liability, without prejudice to any question of costs, and the usual consent order for a reference was made in the registry. On October 15, the plaintiffs filed their particulars of claim, which, including a sum of 10*l.* for loss of fishing, and 16*l.* for wages lost by the two hands, amounted to 386*l.* 2*s.* On October 31, the defendants paid 200*l.* into Court. On November 19, the registrar made his report, disallowing such portion of the claim as related to loss of fishing and loss of wages, and, after deducting 20*l.* produced by the sale of the wreck, assessing the damages at 218*l.* 17*s.* with interest at 4 per cent. from the date of the collision. The defendants thereupon forwarded the plaintiffs a cheque for 18*l.* 17*s.*, being

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the excess over the amount paid into Court, and consented to the plaintiffs taking the 200*l.* out of Court.

Fletcher, (*Sceales* with him), for the plaintiffs. The plaintiffs are obliged to move for the confirmation of the registrar's report, and cannot get the 200*l.* out of Court without an application for the purpose. The plaintiffs also ask for an order that the defendants pay them their costs of the action and of the reference on the High Court scale. The main portion of the claim consisted of 300*l.*, the estimated value of the smack and her stores. Of this sum the registrar awarded 190*l.*, so that a very substantial amount has been recovered. In the case of *The Williamina* (1), where the claim was 295*l.* 18*s.* 1*d.* and the registrar awarded 199*l.* 18*s.* 6*d.*, the costs of the action were allowed. As the plaintiffs' vessel was run down in broad daylight, the crew barely escaping with their lives and losing all their effects, indulgence will be shewn in the matter of costs, which are entirely in the discretion of the Court, as the statutory restrictions imposed by the County Courts Admiralty Jurisdiction Act, 1868 (2) are impliedly repealed by the rules of the Supreme Court: *Tenant* v. *Ellis.* (3)

Butler Aspinall, for the defendants. This action should have been brought in the county court, and, therefore, the plaintiffs

(1) 3 P. D. 97.

(2) 31 & 32 Vict. c. 71, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction to try .... the following causes .... (3) As to any claim for damage .... by collision .... in which the amount claimed does not exceed three hundred pounds."

Sect. 9: "If any person shall take in the High Court of Admiralty .... proceedings which he might .... have taken in a county court .... and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that Admiralty cause is limited .... he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty before whom the cause is tried .... shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty."

(3) 6 Q. B. D. 46. See, however, s. 5 of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), which came into force on October 24, 1890: "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the *express provisions of any statute, whether passed before or after the commencement of this Act*, the costs of and incident to all proceedings in the Supreme Court .... shall be in the discretion of the Court or judge." —*Reporter's note.*

are not entitled to any costs. In the case of *The Herald*, (1) in which the claim of the plaintiffs was 328*l.* 0*s.* 5*d.* and the registrar allowed 246*l.* 2*s.* 6*d.*, Butt, J., laid it down that, unless there were special circumstances, costs would not be allowed. The defendants have throughout the proceedings reserved the right to dispute their liability for costs, and, in addition, by sending a cheque for the balance and consenting to the plaintiffs taking the 200*l.* out of Court, they rendered the present application unnecessary, and are entitled to the costs of the motion.

SIR JAMES HANNEN, President. This case does not seem distinguishable from *The Herald* (1), and I agree with Butt, J., that it lies upon suitors who have instituted proceedings in the Superior Court to shew special circumstances justifying their conduct. No special circumstances have been shewn here. I have been asked to extend indulgence to the plaintiffs; but I am unable to do that, as I must administer justice upon some principle. The only hesitation I have felt is whether or not the costs should be allowed on the county court scale; but I do not feel justified in adopting any other rule than that laid down by Butt, J., viz., that, the proceedings having been taken in the Superior Court when they might have been instituted in the county court, the plaintiffs are not entitled to any costs, whether of the action or of the reference, and I condemn them in the costs of the motion.

Solicitors for plaintiffs: *Todd, Dennes, & Lamb.*
Solicitors for defendants: *Pritchard & Sons.*

(1) 63 L. T. (N.S.) 324.

T. L. M.

C. A.
1890
Nov. 19

[IN THE COURT OF APPEAL.]

HANDLEY *v.* HANDLEY.

Divorce—Access to Children—Wife found guilty of Adultery—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4.

Where a decree for dissolution of marriage has been made on the ground of the adultery of the wife, and the infant children of the marriage have been given into the custody of the husband, the Court is not precluded from making an order giving the divorced wife access to them, but as a general rule such an order will not be made.

THIS was an appeal by the respondent, against whom a decree for dissolution of marriage had been made on her husband's petition, against a refusal of the president to make an order, giving her access to her children. The parties were married in October, 1876. There were two children of the marriage, both boys, born respectively in August, 1877, and April, 1879. In April, 1885, the husband petitioned for dissolution of the marriage, on the ground of the wife's adultery with the co-respondent. On July 16, 1885, a decree nisi for the dissolution of the marriage was made, and it was ordered that the children should remain in the petitioner's custody until further order, and should not be removed out of the jurisdiction without the sanction of the Court.

On January 26, 1886, the decree was made absolute. On February 27, 1886, the respondent married the co-respondent, and they had ever since lived together. Up to November 1887, the children were allowed by the father to visit their mother occasionally, and she was allowed to visit them. In November, 1887, the petitioner went abroad, giving full powers to his solicitor as to the management of his property, and directing that the children should be sent to a preparatory school, and that the respondent should be allowed to visit them, but that they were not to be allowed to visit her.

On December 15, 1887, the respondent took out a summons asking that she might have access to the children, and that they might be allowed to visit her during their holidays. On

March 20, 1888, the President, after argument in Court, refused the application.

For some time after this the petitioner allowed the respondent to have access to the children; but in June, 1890, the permission was withdrawn, and the respondent was informed that she could no longer visit them.

The respondent, on June 14, 1890, took out a summons, asking that she might be allowed free access to the children and that they might be permitted to visit her during their holidays. The petitioner, who had recently married again, deposed that he was informed and believed that the respondent had endeavoured to prejudice the minds of the children against him and his present wife, and had called the latter by an improper name before the children. The respondent denied this by affidavit. The application was heard by the President in chambers and refused. The respondent appealed.

Sir E. Clarke, S.G., and *Oswald*, for the respondent. The text-books lay it down as a rule that access to the children is not to be given to a woman who is divorced by reason of her adultery. This rule was founded on Talfourd's Act (2 & 3 Vict. c. 54, s. 4) which gave the Court a power which it did not formerly possess of interfering with the father's right to the custody of his children, apart from any misconduct of his, and enabled the Court to give the mother access to infant children in the custody of the father if it thought right, and to give her the custody of children under seven years of age if it thought proper; but the 4th section expressly precluded the making an order in favour of an adulteress. This was the state of the law till the passing of the Divorce Act, 1857 (20 & 21 Vict. c. 85), the 35th section of which enabled the Divorce Court to make such provision in the final decree in a divorce suit as it might deem just and proper with respect to the custody, maintenance, and education of the children of the marriage. The Divorce Act, 1859 (22 & 23 Vict. c. 61, s. 4) enabled the Court to make a similar provision after decree. In 1861 the point came before Sir C. Cresswell in *Clout* v. *Clout* (1), and he refused to give a

(1) 2 Sw. & T. 391.

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woman who had been divorced for adultery access to her children, treating the Act (2 & 3 Vict. c. 54) as furnishing a precedent; and so in *Bent* v. *Bent* (1) and in *Seddon* v. *Seddon* (2) he said that he had no power to make an order in her favour. But the rule was not absolute, an order for access having been made in such a case in 1870: *Taylor* v. *Taylor*. (3) In 1873 Talfourd's Act was repealed by the Act 36 & 37 Vict. c. 12, as to the custody of infants, and the fetter which it imposed by s. 4 was not re-enacted. In *Symington* v. *Symington* (4) it was held by the House of Lords that the Act 24 & 25 Vict. c. 86, s. 9, which is in the same terms as 20 & 21 Vict. c. 85, s. 35, gave the Court the widest discretion. The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7, enables the Divorce Court to declare a party through whose misconduct the decree has been made to be unfit to have the custody of the children; but, of course, there could not be any such declaration here, as the decree was before that Act. The Court thus has an ample discretion, there being no hard and fast rule, and the respondent asks the Court to look at the circumstances of the case. The father allowed access for three years and a half, and it is a great hardship for the mother suddenly to be deprived of all access to her children. The continuance of access till this time shews that the father did not consider that intercourse with the mother was injurious to the children; the allegations as to the respondent prejudicing the children against the petitioner and his second wife are most fully and explicitly denied. The question appears to have been hardly discussed at all since the cases before Sir C. Cresswell, the existence of the rule being taken for granted. The judge had his mind imbued with the old rule, and though it cannot be said that he did not enter into the circumstances of the case, yet the bias produced by the old rule led him not to give sufficient weight to the respondent's case. In *Hyde* v. *Hyde* (5) access was given to a guilty husband, and there is no sufficient ground for a distinction between husband and wife in this respect. The principle enunciated by Lord Cottenham in

(1) 2 Sw. & T. 392.
(2) 2 Sw. & T. 640.
(3) 39 L. J. (P. & M.) 23.
(4) Law Rep. 2 Sc. & D. 415.
(5) 29 L. J. (P. & M.) 150.

Warde v. *Warde* (1), that the children ought to be brought up if possible with a respect for both their parents, should be regarded. The respondent does not ask for custody of the children, but for access to them subject to such limitations as the Court thinks fit to impose.

Inderwick, Q.C., and *Searle*, for the petitioner, were asked whether they contended that there was a hard and fast rule that a guilty mother could never be allowed to have access to her children; and on their stating that they did not contend for such a proposition, they were not called upon.

LINDLEY, L.J. This is an appeal by the respondent, whose marriage has been dissolved on account of her adultery, from a decision of the President, refusing to make an order giving her access to the children of the marriage, and leaving the question of access to the discretion of the father. The question turns upon the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35. The statute 22 & 23 Vict. c. 61, s. 4, only extends the time for making orders under it, and is immaterial for the present purpose. The 35th section enacts that the Court may make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of the suit. This language is express and unmistakeable, and clearly gives to the judge of the Divorce Court a wide discretion as to the custody of the children, though not a discretion which cannot be the subject of an appeal. This discretion, in my opinion, overrides both the common law rules and the Chancery rules as to the custody of children which were in force when the Act was passed. The judge is not bound to follow any of those rules, though he will have regard to them in exercising his discretion; but he will be mainly guided by the particular circumstances of the case before him. This appears to me the true construction of the section, and this view is fully warranted by what was said in the House of Lords in *Symington* v. *Symington* (2) as to the effect of 24 & 25 Vict. c. 86, s. 9, which is almost identical in its terms with the sections we are now considering. At the time when the Act of 1857 was passed

(1) 2 Phil. 787. (2) Law Rep. 2 Sc. & D. 415.

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Serjeant Talfourd's Act (2 & 3 Vict. c. 54), s 4, was still in force, and following the analogy of that Act, the Divorce Court adopted the rule not to give to an adulteress the custody of the children, nor even access to them. In one case Lord Penzance gave her access to the children: *Taylor* v. *Taylor* (1); but we have ascertained that in that case the order was made by consent. I do not say that the Court can in no case give to an adulteress access to her children; there might be circumstances under which it would think fit to do so, but they must be very exceptional circumstances. The question before us is whether we ought in the present case to take a view of what is right and proper different from that taken by the President. It would need very strong circumstances to lead us to overrule his discretion. If, for instance, he had gone on the ground that he was bound by a fixed rule which left him no discretion, or if some material circumstances in the case had not been brought before him, we might have interfered. But it is admitted that the President considered all the circumstances of the case. Here the wife was divorced for adultery, and forthwith married again. The husband, while unmarried, allowed her access to the children, but on his marrying again he refused it. His marrying again made a great difference. He might well say, "This lady has broken up my first home, and if I do not take care she may break up my second home." I think that his refusing access was reasonable, and that the order appealed from ought not to be disturbed.

BOWEN, and FRY, L.J., concurred.

Appeal dismissed.

Solicitors for appellant: *Cunliffes & Davenport, for Lingards, Manchester.*

Solicitors for respondent: *Vanderpump & Eve.*

(1) 39 L. J. (P. & M) 23.

H. C. J.

SWIFT *v.* SWIFT.

1890
Nov. 25.

Restitution of Conjugal Rights—Application by Husband—Non-compliance with Decree—Order for Settlement out of Wife's Separate Property—Discretion of Court—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.

Where a decree for restitution of conjugal rights, made on the application of the husband, has not been complied with by the wife, the Court in exercising its discretion to order a settlement out of the wife's separate property for the benefit of the husband, under 47 & 48 Vict. c. 68, s. 3, may take into consideration the general conduct of the parties.

In ascertaining the amount of the annual payment to be settled by the wife upon the husband, the Court declined to go into a minute debtor and creditor account of the sums spent by the husband or wife on household expenses and the like, but directed that a deduction should be made from the amount of the annual payment to the husband until a loan of 300*l.* which he had obtained from his wife was repaid; and also took into consideration the contingency of the husband being able to acquire an income by his own earnings.

APPLICATION to confirm the registrar's report, on a petition by the husband, under s. 3 of the Matrimonial Causes Act of 1884, for a permanent maintenance out of the separate property of his wife against whom he had obtained a decree of restitution of conjugal rights, which she had refused to obey. The registrar found that the husband's income was 45*l.*, and the wife's income 820*l.* 16*s.* 8*d.*, viz., 227*l.* 16*s.* 8*d.* from property comprised in the marriage settlement, 73*l.* from other property acquired since the marriage but settled on the same trusts, and 520*l.* from property bequeathed by her father without power of anticipation; but he submitted that the Court had no power to vary the marriage settlement, nor to order any payment to be made out of the income enjoyed by the wife under the will of her father.

On April 29, 1890, Butt, J., made an order that the wife should secure to her husband a certain sum annually, and referred it to the registrar to settle the quantum. (1) The registrar reported that the sum to be settled on the husband should be 243*l.* per annum.

The petitioner had made an affidavit in support of his application as to his relations with his wife and the pecuniary transactions

(1) 15 P. D. 118.

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between them, and he now attended, by order of the Court, to be cross-examined upon his affidavit. He admitted that his wife had at various times advanced sums to defray the household expenses, but asserted that many of these advances had been repaid. He also admitted that he had borrowed 300*l.* from her for which he had assigned as security his interest in a school kept by his daughter in partnership with another lady. Part of this loan he alleged he had repaid, and he intended to repay it all. He denied that he had ever been guilty of unkind behaviour to his wife, and declared that he was anxious that she should return and live with him. With regard to certain expressions in several letters from him to her, he said that these letters were written under great provocation.

B. Deane, for the petitioner.
C. Matthews, for the respondent.

THE PRESIDENT. I am of opinion that I cannot go into a minute debtor and creditor account between a husband and wife who have lived together for many years, the husband at one time having found the means for household expenses, and the wife at another taking on herself the whole burden. All that must be put aside in considering what is to be done when, unfortunately, marital relations have come to an end. But when we come to a loan made by the wife to the husband, out of her means, for which he gave security, it is obvious that that ought to be taken into consideration in one form or another in exercising the very large discretion which the Court possesses in this matter. I have heard the evidence, because it certainly is not perfectly clear to my mind that I should not be bound to take into consideration the general conduct of the parties. Though it may fall short on the wife's part of being a defence to a suit for the restitution of conjugal rights, I cannot say that it is absolutely to be excluded from consideration, and I have not seen anything in the husband's letters which have been read which would substantially modify my judgment. Though there are expressions to be regretted in the husband's letters, they do not amount to anything on which I could base a decision that

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he should not be entitled to a share in his wife's income. I must say, however, there is another element, which does not appear to me to have been considered by the registrar—and that is the possibility of the husband being able to earn an income for himself. The registrar appears only to have taken into account the sum of 45*l.*, which he treats as the husband's fixed income. But the husband has earned money before, and he himself has spoken in his letters of his power to earn money in the future. Therefore, I think that something more than the registrar has allowed ought to be added to the husband's independent income. I have come to the conclusion, using the large discretion which I possess to the best of my ability, that the proper order to make will be to reduce the sum allotted by the registrar to the husband—243*l.*—to 200*l.*, and to order that out of that 200*l.* the sum of 75*l.* a year be deducted until the balance of the loan of 300*l.* is repaid, and I shall direct a settlement of the wife's property to be drawn up so as to carry out that arrangement.

Solicitors for petitioner: *Peacock & Goddard.*

Solicitor for respondent: *Harston.*

W. L.

[DIVISIONAL COURT.]

1890 *Nov.* 10.

1891 *Jan.* 24.

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Admiralty—Charterparty—Ambiguity—Extrinsic Evidence—Vessel "always afloat" in Dock though unable to cross Sill.

By charterparty it was agreed between the plaintiffs, shipowners, and the defendants, charterers, that the plaintiffs' steamer, then trading, but "expected ready to load about April 10," should, "with all convenient speed, sail and proceed to the (defendants') loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo" . . . . "lighterage, if any necessary, to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk and expense."

The vessel was delayed by stress of weather on her inward voyage, and did not arrive at the North Dock, Swansea, until April 30, at which time the tides were taking off. Though the vessel could have completed her loading "always afloat" in the North Dock, the owners of the vessel, before all the cargo had been taken in, and to prevent her being delayed a week before she would be able again to get over the sill of the dock, removed her to another dock, and there took in the remainder of the cargo.

In an action by the shipowners for freight admittedly due, the charterers, as

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defendants, counterclaimed for (inter alia) the cost of the carriage of the remainder of the cargo to the other dock:—

Held, that the clause as to lighterage was ambiguous, and on extrinsic evidence being admitted shewing that the intention of the parties was that, if the steamer was not able to complete her loading at the North Dock, the defendants were to bear the expense of completing the loading elsewhere:

Held, further, that the shipowners were liable for the cost of the carriage to the other dock, as the vessel could, within the meaning of the charterparty, have been loaded in the North Dock, always afloat, and the fear of the detention of the vessel did not justify them in removing her.

APPEAL by defendants, the charterers of the steamship *Curfew*, against the decision of the judge of the city of London Court—in an action by the plaintiffs, owners of the *Curfew*, for freight and demurrage—disallowing (inter alia) the defendants' counterclaim for lighterage amounting to 15*l.* 1*s.* 6*d.*

The claim of the plaintiffs for balance of freight was not disputed, and the questions involved in the other portions of the plaintiffs' claim, and of the defendants' counter-claim, do not call for report. The facts—so far as material on the point as to the plaintiffs' liability for the cost of the carriage of a portion of the cargo from one dock, where the vessel was loading, to another dock to which the plaintiffs had removed her—were as follows:—

By charterparty, dated March 14, 1889, made between the plaintiffs, the owners of the steamship *Curfew*, and the defendants, the Atlantic Patent Fuel Company, Limited, the *Curfew*, which was then "trading and expected ready to load about April 10," was "with all convenient speed" to "proceed to the company's (that is, the defendants) loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2100 tons" of fuel, "lighterage, if any necessary, to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk and expense."

Owing to stress of weather on the inward voyage and other causes of delay, the vessel did not enter the North Dock, Swansea, until April 30. On May 2 she took up her position at the defendants' loading berth, and by May 4, the defendants had loaded her with 1916 tons of fuel, making her draft of water 19 ft. 6 in.

From the time when the vessel came into dock the tides had been taking off, and though the water in the dock was always maintained by pumping at such a level that the *Curfew* could have loaded a complete cargo of 2100 tons "always afloat," the master found that the depth over the sill of the dock, at high water, had fallen to 22 ft. 6 in., and that if he did not get out by the evening tide on May 4 he would have to wait until May 12, and, if loaded with a full cargo, he would be detained one day more. He accordingly, under instructions from his owners, left the North Dock and proceeded to the Prince of Wales Dock, and there completed his loading, the defendants, under protest, sending round the remainder of the cargo in trucks.

On the hearing of the case in the Court below, the learned judge held that the clause in the charterparty as to lighterage was ambiguous, and, on the application of the plaintiffs, he admitted the following evidence to shew what took place at the time the contract was entered into: The statement of the shipbroker who arranged the charter for the owners of the *Curfew*, that the defendants' agent agreed on March 13, previously to the charter being drawn up, to pay lighterage if any was required, subject to consulting his principals, and that he subsequently said that the defendants had agreed to everything after he had sent them the following telegram: "*Curfew* accepts 26*s.* 6*d.*, charter sent last night, load North Dock, always afloat, lighterage if any necessary through inability take full cargo North Dock our expense . . . ." To which he received answer: "Charter *Curfew*, try get owners bunker here after loading, also to leave out words always afloat but charter in any case." The charterparty was then drawn up and forwarded by the defendants' agent to them with the following letter: "I enclose copies of charterparty per *Curfew* s.s." . . . . "I had to give way on all points, and knowing our position I did not think it prudent to risk losing the vessel in view of your last message."

On these facts, the learned judge in the Court below gave judgment against the defendants on the counter-claim, holding that the amount was not recoverable, on the ground that it was necessary for the vessel to leave the dock, and that

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the evidence admitted to explain the charterparty shewed that by arrangement of the parties the plaintiffs were entitled to move her.

Sir Walter Phillimore and *L. E. Pyke*, for the defendants. As the amounts are agreed, the question in respect of the counterclaim for lighterage is one of principle only, and comes to this: Had the master of the *Curfew*, as agent for the plaintiffs, a right to say to the defendants, "I am not going to be neaped; you must send the balance of the cargo round to me in the Prince of Wales Dock, and pay the cost of the carriage"? It is submitted that he could not do this, as the words of the charterparty are precise that the vessel is to "proceed to the North Dock and *there* load always afloat a full cargo." This seems to dispose of the question; but the plaintiffs contend that the clause as to lighterage is ambiguous, and that the extrinsic evidence, admitted by the learned judge in the Court below, alters the plain meaning of the charterparty and varies its effect. That evidence ought not to have been received, as the lighterage clause means exactly what it says, that the charterer is to pay the expense of any lighterage to enable the steamer to complete loading at the North Dock, and the evidence which was admitted conflicted with the view taken in the Court below, for the telegram of the defendants' agent to his principals, dated March 13, makes the lighterage payable by the defendants only if the vessel is unable to take a full cargo in the North Dock. A letter also, dated May 4, from the defendants' manager to their agent, and written after the dispute arose—"I shall stick by the exact wording of the charter. We can load her afloat in the North Dock alongside our wharf, and if they want her loaded elsewhere they must pay the cost"—shews that the defendants from first to last were contracting to load the *Curfew* in the North Dock always afloat, and if they could not load her alongside their wharf always afloat, and the vessel had to be moved more toward the middle of the dock, then the expense, if any, of the lighterage necessary would be borne by them.

Barnes, Q.C., and *Laing*, for the plaintiffs. The true construction to be put upon the words in the charterparty, "and there

load always afloat," must be that the vessel is to be loaded "always afloat" and get out of the dock so loaded by the next tide. If she cannot get over the sill of the dock with a complete cargo, she must be entitled to go out as soon as she has loaded down to the limit of safety over the sill, and finish the loading elsewhere. The parties to a mercantile contract cannot have intended otherwise, and it was precisely to meet this contingency that the clause as to the expense of lighterage falling on the defendants was inserted. To shew the true meaning of this clause, extrinsic evidence was properly admitted in the Court below; for in *Lewis* v. *Great Western Railway Co.* (1) Bramwell, L.J., in giving judgment, said, at p. 202: "I think it is a rule of evidence or law that where words are used, which would comprehend some other than one necessarily exclusive meaning, upon which the judges are to put an interpretation, then, as Parke, B., said, all the surrounding circumstances and the course of dealing between the parties, not only may, but must be looked at, to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing"; and Brett, L.J., says, at p. 208: "Now I apprehend that in order to construe a written instrument, the Court is entitled to have all the facts relating to it, and which were existing at the time the written contract was made and which were known to both parties. Certain facts existing at a time when a written contract is made . . . sometimes consist of a knowledge of the matter about which the parties were negotiating; the Court is entitled to ask for those facts, to enable it to construe the written document."

The words "always afloat" must have reference to the ability of the vessel to get away, for in *Shield* v. *Wilkins* (2), where the plaintiff's ship was to proceed to B., or as near thereto as she could safely get, and there load a full cargo, the vessel proceeded within the harbour at B., and received a portion of her cargo; but owing to want of water she then went without the bar to take in the rest, and the shipowner was held justified, as a vessel could not be said to get safely to a place from which she could not safely get away with a full cargo.

(1) 3 Q. B. D. 195. (2) 5 Ex. 304.

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In the *General Steam Navigation Co.* v. *Slipper* (1), where the vessel, having loaded a complete cargo, could not get over the bar, it was held that the ship might have stayed outside the bar, and have put the charterers to the expense of sending the cargo there; but the master having gone to the jetty and there taken on board the cargo, the duty of the charterers was at an end. The plaintiffs, therefore, in the present case, by taking the vessel out avoided the question which arose in that case, and were right in so diminishing the loss which would have otherwise occurred. In the case of *The Alhambra* (2) the master refused to allow the consignee, at his own expense, to lighten the vessel in Lowestoft Roads in order to get into Lowestoft harbour, where she could not, when loaded, lie afloat, and the master was held justified in going to Harwich, the nearest safe port.

[BUTT, J. There the words were "as near thereunto as she could safely get."]

[The case of *Allen* v. *Coltart* (3) was also referred to.]

Sir Walter Phillimore, in reply. The argument of the plaintiffs requires the addition to the charterparty of a clause to the effect that the vessel is only to be loaded to such a depth that she can go away at once; but if the impediment is not permanent, but caused periodically, as by tides, the cases shew that the vessel may have to wait until she can go away. In *Parker* v. *Winlow* (4) —where, owing to the tides being neap, the vessel had to lay on the sand some days, till the tides got higher and she could reach the place in the port, which the consignee had the option of naming—it was held that the delay in getting to it was only occasioned in the ordinary course of navigation in a tidal harbour, and the shipowner must bear the loss. In *Pringle* v. *Mollett* (5) the ship was detained by ice after the loading was completed, and it was held that the charterer was not liable; for when once the cargo is loaded any inconvenience falls upon the shipowner.

Cur. adv. vult.

(1) 11 C. B. (N.S.) 493; 1 Mar. L. C. (O.S.) 180.
(2) 6 P. D. 68.
(3) 11 Q. B. D. 782.
(4) 7 E. & B. 942.
(5) 6 M. & W. 80.

1891. Jan. 24. The judgment of the Court (Sir James Hannen, President, and Butt, J.) was delivered by

BUTT, J. (who, after stating the nature of the action, continued). The defendants claimed to set off the cost of carriage of a portion of the fuel from the North Dock at Swansea, where it is alleged by the defendants the *Curfew* was to load, to the Prince of Wales Dock, where, as alleged by the defendants, the vessel was improperly taken. [The learned judge then referred to the terms of the charterparty above set out, and proceeded:—]

The vessel did not, in fact, arrive at Swansea till April 30. She proceeded to the North Dock, and there loaded a portion of the cargo; but, in consequence of the delay in her arrival at the expected time, although she could have taken in the remainder of the cargo, remaining always afloat, she could not, by reason of the neap tides then existing, when fully loaded, have passed over the sill of the dock for a week. She therefore left the North Dock incompletely loaded, and went to the Prince of Wales Dock, and the remaining portion of the cargo had to be sent round to the Prince of Wales Dock.

The first question in the cause is, Who is to bear the expense of sending the fuel round to the Prince of Wales Dock? The defendants contend that, by the terms of the charterparty, they were only liable to pay for such lighterage as might be necessary to complete the loading at the North Dock. The plaintiffs contend that the true meaning of the charterparty is, that if the steamer was unable to complete the loading at the North Dock, then that the defendants were to pay the lighterage necessary to enable the steamer to complete the loading. The learned Judge of the Court below considered the language of the charterparty ambiguous, and admitted evidence of the previous correspondence between the parties to shew what their intention was in entering into the charterparty; and that evidence being admitted, we agree with the learned judge that it became clear that the plaintiffs' contention was well-founded, and that the intention of the parties was, that if the steamer was unable to complete loading at the North Dock, the defendants were to bear the expense of completing the loading elsewhere. This appears from the telegram of the defendants' agent to the defendants, in

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which he says that the terms proposed were, "lighterage, if any necessary through inability to take full cargo North Dock, our expense," which was assented to by his principals. This was the contract which the parties intended to express by the charterparty.

We are of opinion that there is sufficient ambiguity in the language of the charterparty to warrant the admission of evidence to explain it; but we are of opinion that the plaintiffs have failed to establish that they were unable to complete the loading of the steamer at the North Dock within the meaning of the charterparty. But for the fact that the vessel did not arrive at Swansea at the time expected, viz. April 10, she would have been able to complete her loading at the North Dock, and cross the sill of the dock with her full cargo; but, in order to avoid being detained in the dock a week, she left the North Dock before completing her loading, though she might have continued to receive cargo in the North Dock, remaining always afloat.

We are of opinion that the fear of this detention did not justify the removal of the steamer from the North Dock. It did not render the steamer unable to complete her loading while afloat in the dock; it only rendered the performance of the contract by the plaintiffs more onerous to them by reason of the loss of the use of their vessel during the neap tides.

We think, therefore, that the decision of the learned judge below was wrong on this point, and that the defendants established their set off or counter-claim as to 15*l.* 1*s.* 6*d.* for the cost of taking the remainder of the cargo round to the Prince of Wales Dock.

[The learned judge then dealt with the other questions in the case, the decision of the Court being against the defendants, and continued:—]

The result is, that as each party has been partially successful in the appeal, we leave each party to pay his own costs of the appeal, and the defendants will pay the costs below.

Solicitor for appellants: *Robert Greening.*

Solicitors for respondents: *Botterell & Roche.*

T. L. M.

[IN THE COURT OF APPEAL.]

C A.
1890
Nov. 19;
Dec. 3, 16

REDFERN *v.* REDFERN.

Divorce—Practice—Affidavit of Documents—Discovery tending to shew Adultery —Discovery by Infant.

In a petition by a husband for dissolution of marriage, the petitioner applied for an order that the respondent, who was a minor, should make the usual affidavit as to documents. The only issue in the suit was that of adultery:—

Held, by Butt, J., on the authority of *Mayor* v. *Collins* (24 Q. B. D. 361), that as the respondent was an infant, such an order could not be made against her:

Held, by the Court of Appeal, that, as *Mayor* v. *Collins* turned upon the rules of the Supreme Court, it was not applicable, since by Order LXVIII., rule 1 (*d*), those rules do not apply to proceedings for divorce.

Whether an order for discovery cannot be made against an infant in proceedings for divorce, *quære*.

But, *held*, that in the present case an order ought not to be made, for that discovery ought not to be required from a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery.

THIS was a petition by a husband for dissolution of marriage on the ground of the wife's adultery. The respondent was still a minor, having been born in 1870, and appeared in the suit by her guardian. The only issue raised on the petition was that of adultery.

On August 6, 1890, the petitioner took out a summons calling on the respondent to make an affidavit whether she had in her possession or power any, and, if any, what, documents relating to the matters in question in the suit. The summons was heard by the registrar, who held that such an order could not be made against an infant. The petitioner appealed; but Butt, J., on the authority of *Mayor* v. *Collins* (1), upheld the decision of the registrar. The petitioner appealed.

Nov. 19. *Inderwick, Q.C.*, and *Searle*, for the petitioner. There is no doubt that in Chancery an infant cannot be ordered to give discovery, but that this rule does not apply to proceedings for divorce. The Act of 1857 (20 & 21 Vict. c. 85) contains no provisions as to discovery, but appears to leave it to the Court

(1) 24 Q. B. D. 361.

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under s. 53 to settle its course of practice in proceedings for divorce. In *Winscom* v. *Winscom* (1) an affidavit of documents was ordered, and this is a common practice. The question then is, whether it prevails in the case of an infant.

[LINDLEY, L.J. The registrar informs me that it was the practice to order discovery by infants until a recent decision in the Queen's Bench Division.]

That is *Mayor* v. *Collins* (2), in which it was held that an infant could not be compelled to answer interrogatories; but that was decided on the ground of the Rules of the Supreme Court, 1883, Order XVI., rr. 16, 21; Order XIX., r. 13; Order XXXIV., r. 4, which assimilate the practice to that of the Court of Chancery, and the attention of the registrar and the judge was not called to the fact that the General Orders do not apply to divorce proceedings: Order LXVIII., r. 1 (*d*). In *Dyke* v. *Stephens* (3) Pearson, J., refused to order the next friend of an infant to make an affidavit as to documents, treating the case as quite distinct from that of a corporation. In *Southwark, &c., Water Co.* v. *Quick* (4) an order was made for a person to make an affidavit of documents on the part of a corporation. It cannot be disputed that it is not the practice of the Chancery Division or the Queen's Bench Division to order an infant to make discovery; but the petitioner contends that the Divorce Court, not being bound by the practice of either of those Divisions, can make such an order.

Finlay, Q.C., and *R. Isaacs*, for the respondent. There is nothing to shew that the Divorce Court has more extensive powers than the Chancery Division or the Queen's Bench Division.

[The Court directed the appeal to stand over for a fortnight, that inquiries might be made as to the old practice, and the appeal then be further argued.]

Dec. 3. *Inderwick, Q.C.*, and *Searle*, for the petitioner. There is nothing in the rules of the Divorce Court which bears on the present question. Before the Judicature Acts the Ecclesiastical Court had a power of ordering discovery of documents: *Noverre*

(1) 2 Sw. & Tr. 380.
(2) 24 Q. B. D. 361.
(3) 30 Ch. D. 189.
(4) 3 Q. B. D. 315.

v. *Noverre* (1); *Boxley* v. *Stubbington* (2); *Dun* v. *Coates.* (3) The Act 32 & 33 Vict. c. 68, s. 3, made the parties to a divorce suit competent witnesses, but provided that no witness should be liable to be asked or bound to answer any question tending to shew that he or she had been guilty of adultery; and the Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 43, enables the Court to examine the petitioner except as to adultery.

[LINDLEY, L.J. If you are right, who is to make the affidavit —the infant or the guardian?]

It may be presumed that it will be the infant.

[BOWEN, L.J., referred to *Crowe* v. *Governor and Company of the Bank of Ireland.* (4)]

The cases are collected in *Dyke* v. *Stephens.* (5) Then ought the Chancery Rules to be imposed on the Divorce Court?

[*Finlay, Q.C.*, referred to *Harvey* v. *Lovekin* (6) as to the effect of the Judicature Acts.]

The Court will not import the Chancery practice into the Divorce Court except where it is reasonable: *Mordaunt* v. *Moncreiffe.* (7) The right of discovery in the Ecclesiastical Court is shewn by *Anon.* (8) The Chancery rule probably arose from this, that the Court having jurisdiction over infants protected its wards, and an infant upon becoming a party to a suit in Chancery became a ward of Court. *Hyde* v. *Hyde* (9) shews that the jurisdiction of the Court of Chancery over infants is special, and confined to wards of Court. A strict interpretation of the words of 32 & 33 Vict. c. 68, s. 3, would lead to absurdity; it would exclude evidence on the only point on which the evidence of the party is wanted; but a strict construction has not been put upon it: *Hebblethwaite* v. *Hebblethwaite.* (10) An infant in a divorce suit is in quite a different position from that of an infant in Common Law or Chancery proceedings. The latter relate to matters as to which infants cannot bind themselves by contract; but infants can contract marriage, and the rights and remedies arising from that contract ought to be held enforceable against them.

(1) 4 Notes of Cases, 652.
(2) 2 Lee, 501.
(3) 1 Atk. 288.
(4) 19 W. R. 910.
(5) 30 Ch. D. 189.
(6) 10 P. D. 122.
(7) Law Rep. 2 H. L., Sc. 374.
(8) 2 Ves. Sen. 451.
(9) 13 P. D. 166, 174.
(10) Law Rep. 2 P. & D. 29.

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Finlay, Q.C., and *Isaacs*, for the respondent. First with regard to the question of infancy, the petitioner's counsel take too narrow a view of the ground of the Chancery rule against compelling infants to give discovery. It did not depend on wardship, but on the principle that an infant could not make a binding admission. This is stated as the rule in Daniell, Chancery Practice, 6th ed. 178, and Order XIX., r. 13, appears to recognise it. The same rule prevailed at common law: *Morgan* v. *Thorne* (1), and it is not reasonable that the Divorce Court should form an exception. In *Harvey* v. *Lovekin* (2) the effect of the Judicature Acts as to the power of the Divorce Court to order discovery is considered.

Again, it is a settled principle that a person need not answer any questions where his answering might expose him to penalty or forfeiture, and this is not confined to cases where the answer might expose him to criminal proceedings: Daniell, Chancery Practice, 6th ed. 432. The respondent then ought not to be called upon to give discovery which may prove her guilty of adultery.

[FRY, L.J. If you are right in that, an adult respondent could not be ordered to make an affidavit of documents, but by the course of the Divorce Court she can.]

Discovery may be wanted for other purposes than proving adultery. The Court may not think fit to overrule an old course of practice; but that is no reason why it should be extended. *Shaw* v. *Shaw* (3) shews that there is no greater power of discovery in the Divorce Court than in Chancery and at Common Law. In *Pollard* v. *Pollard* (4) it was held that the powers of discovery were given by the Common Law Procedure Act.

[BOWEN, L.J. I am not prepared to agree to that.]

[They referred to *Dun* v. *Coates* (5); *Fuller* v. *Ingram* (6), and Dodd and Brookes' Probate Practice, pp. 907, 911.]

Inderwick, Q.C., in reply.

Cur. adv. vult.

(1) 7 M. & W. 400, 408.
(2) 10 P. D. 122.
(3) 2 Sw. & Tr. 642.
(4) 3 Sw. & Tr. 613.
(5) 1 Atk. 288.
(6) 28 L. J. (N.S.) (Ch.) 432.

1890. Dec. 16. LINDLEY, L.J. The question raised by this appeal is, whether an infant respondent in a suit for the dissolution of her marriage, on the ground of her adultery, ought to be required to make an affidavit of documents. Butt, J., has decided that she ought not, and he so decided in supposed conformity with a decision of the Queen's Bench Division in *Mayor* v. *Collins* (1), which is to the effect that an infant is not bound to make such an affidavit in an action in the Queen's Bench Division. That case, however, turned upon the rules of the Supreme Court—viz., Order XXXI., r. 12, and upon the practice of the Court of Chancery before, and of the Chancery Division of the High Court since, 1875—when the Judicature Acts came into operation: see Judicature Act, 1875, s. 25; Order L., r. 2; and Order LXXII., r. 2, as to continuing the old practice where not inconsistent with the rules of the Supreme Court, 1883. But by Order LXVIII., r. 1 (*d*), the rules do not apply to proceedings for divorce, or other matrimonial causes, except when expressly made applicable to such proceedings. There is no rule of the Supreme Court expressly relating to discovery in such proceedings; and the question raised by this appeal must be decided on other grounds than those on which Butt, J., decided it.

When we turn to the Divorce Acts and the rules made under them, no express provision can be found relating directly to the subject in question. There is neither statutory enactment nor rule relating directly to discovery or affidavits of documents. The Divorce Act, 1857 (20 & 21 Vict. c. 85, s. 22), enacts that in all suits and proceedings, other than proceedings to dissolve any marriage, the Court shall proceed on the principles and rules which prevailed in the Ecclesiastical Courts, but subject to the provisions of the Act, and to the rules and orders under it; and, by s. 53, the Court is directed to make such rules and orders concerning the practice and procedure under the Act as it may consider expedient, and to revoke or alter the same. Now, although no rules have been made relating to discovery or affidavit of documents, yet it is plain that the Ecclesiastical

(1) 24 Q. B. D. 361.

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Courts had, and exercised, the power of compelling suitors in them to make discovery, and that this practice has been continued, and discovery, by interrogatories and by affidavit of documents, has been adopted in proceedings for dissolution of marriage, which was beyond the power of the Ecclesiastical Courts.

It is obviously inexpedient to have two sets of rules applicable to discovery in the same Court—viz., one set for those matrimonial causes over which the Ecclesiastical Courts had jurisdiction, and another for those matrimonial causes over which such Courts had no jurisdiction; and it is desirable that the practice and procedure should, as far as possible, be the same in both classes of causes. This view has, I believe, been adopted by the successive judges of the Divorce Court, and a practice has been established, based partly on the old ecclesiastical practice, and partly on the rules which prevailed at common law and in equity, and which now prevail in other branches of the High Court.

The power of the Ecclesiastical Courts to require discovery has been long established and recognized: see 3 Burn's Ecclesiastical Law, p. 298, and *Harvey* v. *Lovekin* (1), and the cases there referred to. This power has, in fact, been constantly exercised by the Divorce Court in divorce cases: see *Euston* v. *Smith* (2), and *Harvey* v. *Lovekin* (1); and in the last case the practice in this respect was held by the Court of Appeal to be legal, although not founded on any express rule.

The practice of requiring affidavits of documents in divorce proceedings seems to have been introduced, or at least settled, in 1864, in *Winscom* v. *Winscom* (3); *Pollard* v. *Pollard* (4); and it has prevailed ever since; and, although not introduced or sanctioned by any express order or rule of the Divorce Court, the decision in *Harvey* v. *Lovekin* (1) is an authority for upholding such practice.

It was contended that a suit for divorce for adultery was a criminal proceeding, or, at all events, that adultery exposed the adulterer to punishment, or to some kind of penalty—i.e.,

(1) 10 P. D. 122.
(2) 9 P. D. 57.
(3) 3 Sw. & Tr. 380.
(4) 3 Sw. & Tr. 613.

penance or fine. It was, however, decided by the House of Lords in *Mordaunt* v. *Moncreiffe* (1) that a suit for divorce was a purely civil, and in no sense a criminal, proceeding. The cases there cited shew clearly that no indictment lies at common law for adultery: see 2 Salk., p. 552; neither is there any statute making it punishable. But adultery, like other forms of fornication and lewdness, exposes the guilty party to ecclesiastical censure and punishment: 2 Burn's Ecclesiastical Law, p. 403, "Lewdness"; and discovery may be resisted on this ground. It is true that ecclesiastical punishment for such offences is practically obsolete; but I cannot say that the jurisdiction of the Courts in this respect has ceased. Indeed, the enactment to which I am about to refer is based on the theory that adultery is punishable, and that no person, therefore, is bound to answer any question tending to prove himself or herself guilty of it.

The practice of requiring discovery in divorce cases is not opposed to the statute (32 & 33 Vict. c. 68, s. 3), which relates to the examination of parties to divorce suits as witnesses; but that statute clearly recognises the doctrine that a person asked about his or her adultery is not bound to answer. By that statute parties to proceedings instituted in consequence of adultery are competent witnesses in such proceedings, "provided that no witness in any proceeding, whether party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Discovery was enforced, both in the Ecclesiastical Courts and in the Court of Chancery, long before parties to suits in those Courts were competent witnesses in such suits, and the statute in question does not, in truth, relate to discovery at all. A very little reflection will shew that, in suits for dissolution of marriage, discovery, whether by interrogatories or affidavit of documents, may be perfectly consistent with the provisions of that Act. In every such suit the marriage of the parties has to be proved; discovery addressed to that subject may be wanted, and, if wanted, is clearly permissible. Again, in a wife's suit for dissolution on

(1) Law Rep. 2 H. L., Sc. 374.

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the ground of adultery and cruelty or desertion, discovery as to these last matters is equally permissible. On the other hand, adultery being an ecclesiastical offence, and the recognition of this state of the law by the legislature being obvious from the prohibitory words in the statute, it would be wrong to compel discovery by means of interrogatories, the object of which is to obtain answers tending to shew that the person interrogated has been guilty of adultery. So, with regard to an affidavit of documents, if there is reason to believe that a party has documents relating to matters in question in the cause, other than his or her adultery, it would be quite right to require an affidavit as to such documents; but, if there is reason to believe that the affidavit is required only for the purpose of discovering documents tending to prove adultery by the person required to make the affidavit no order for such affidavit ought to be made.

The objection, however, that a person's affidavit of documents, or answer to an interrogatory, may tend to criminate him, is an objection which, as a rule, ought to be raised to the production of a document, or to answering an interrogatory. Exposure to punishment, or to a penalty, does not, as a rule, afford a ground for refusing an order for discovery, or for an affidavit of documents. But if discovery, or an affidavit of documents, is wanted solely for the purpose of proving adultery, no order for discovery or for an affidavit ought to be made. Such an order would be oppressive and unjust.

The next and last point for consideration, and the one mainly relied upon by the appellant, is that an infant cannot be compelled to make any affidavit of documents or other discovery. It has certainly been the long-established rule in Chancery not to require an infant to make discovery, and the same rule was followed in the Queen's Bench Division in *Mayor* v. *Collins*. (1) If this matter were open to discussion, I should think the Chancery rule too rigid. Be this as it may, I can find no trace of any such rule in the Ecclesiastical Courts; and the invariable practice in the Divorce Court has, I am informed, been inconsistent with any such rule. I see no reason why this practice should be declared wrong. The point, however, does not require decision in this case, and I say no more about it.

(1) 24 Q. B. D. 361.

Having made the above observations, I ask myself what useful purpose can possibly be attained by compelling the respondent in this suit to make an affidavit of documents? The only possible purpose must be to extract from her an admission that she has or had documents which tend to prove her own adultery. The pleadings allude to other matters, which are, however, wholly immaterial; the sole question in the cause is whether she has committed adultery or not. Guided by the principles explained above, I think she ought not to be required to make any affidavit of documents, not because she is an infant, for I should come to the same conclusion if she were adult. She cannot be compelled to produce the letters which the plaintiff desires to see; she cannot be asked any question tending to shew that she has been guilty of adultery; and, that being the case, to order her to make an affidavit of documents would, in my opinion, be wrong. The appeal, therefore, will be dismissed, with costs.

BOWEN, L.J. It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it—that "no one is bound to criminate himself." Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognised as governing similar subject-matter by common law and equity alike: see *Finch* v. *Finch* (1); *Chetwynd* v. *Lindon* (2). The Ecclesiastical Courts have dealt with the question in a like manner. In *King* v. *King* (3) Dr. Lushington held (in a cause of divorce by reason of adultery) that a party in her personal answers to a libel was not bound to answer upon oath to articles which, though not on the

(1) 2 Ves. Sen. 493. (2) 2 Ves. Sen. 450.
(3) 2 Rob. 153.

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face of them criminatory, might by possibility furnish a link in the evidence against herself: see also *Swift* v. *Swift* (1). Such was the law at the date of the passing of the Divorce Act, at which time, it must be remembered, that the parties to a suit were incapable in the superior Courts of giving evidence themselves on oath in their own case.

The statute 14 & 15 Vict. c. 99, which rendered parties to a suit or action competent and compellable to give evidence, provided by s. 4 as follows: "Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any Court of Common Law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery." And in s. 2 of the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), there was included a similar provision. Such was the law at the time when the present Divorce Court was instituted, and it remains to be seen whether the Legislature has anywhere justified a practice, hitherto unknown, of compelling a party to a divorce proceeding to make answer upon oath of any matter which might tend to prove him or her guilty of adultery. By s. 43 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), the Court was empowered to order the attendance of the petitioner, and to examine, or permit him or her to be examined or cross-examined, upon oath, on the hearing of any petition; but the section provided that no petitioner should be bound to answer any question tending to shew that he or she had been guilty of adultery; and, by s. 48, the rules of evidence observed in the superior Courts were to be applicable to, and observed in the trial of, all questions of fact in the Court: see *Deane* v. *Deane*. (2) An important change in the law was no doubt effected by 32 & 33 Vict. c. 68, being "An Act for the further amendment of the law of evidence." Sect. 3 of this Act enacts that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence

(1) 4 Hagg. 154. (2) 1 Sw. & Tr. 90.

in the same proceeding in disproof of his or her alleged adultery." It seems to result from the history of the subject already set forth, that no power existed down to the Divorce Act, and that no power has since been given by the legislature, to compel a witness to make any answer on oath which would tend to shew that he or she was guilty of adultery. On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted, and, on similar grounds, the Court cannot properly compel discovery on oath of documents which can only be material so far as they may tend to establish that issue, although in ordinary cases such an objection would naturally be raised, not on the summons for discovery, but in the affidavit made in answer to the order.

I do not doubt for a moment that the Court has the power of allowing interrogatories and discovery both in ordinary cases, and even in divorce suits, upon issues which are not directed to the proof of adultery; subject always to the ordinary principles of the law of privilege, and to the same doctrine (wherever applicable) that no one is bound to criminate himself. In *Euston* v. *Smith* (1), which was a suit of nullity, Sir James Hannen stated that he found it to be in accordance with the practice in the Divorce Division to allow interrogatories—a view which was subsequently adopted in the Court of Appeal in *Harvey* v. *Lovekin.* (2) The Ecclesiastical Court in like manner had in former times, and still has, the power of compelling discovery of documents: see *Dunn* v. *Coates.* (3) But it is contrary to the principles of law recognised alike in the Common Law Division, the Chancery Division, and the Ecclesiastical Courts, that a wife or husband should be compelled to answer on oath as to matters tending to shew adultery, whether in the shape of discovery of documents or otherwise, and the legislation affecting the Divorce Court has done nothing to disturb, but much to recognise, this, to my mind, salutary principle. It is true that the House of Lords, in the case of *Mordaunt* v. *Moncrieffe* (4), adopted the conclusion that a divorce suit is not a criminal or penal

(1) 9 P. D. 158.
(2) 10 P. D. 122.
(3) 1 Atk. 288.
(4) Law Rep. 2 H. L., Sc. 374.

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proceeding; but their judgment in no way conflicts with the view that I have above expressed.

The question as to the liability of infants to orders for discovery of documents in the Divorce Court does not, therefore, arise in the present case, which is to be decided on a still broader ground. Whether in matrimonial causes infants are compellable to make discovery, or to answer interrogatories, as to matters other than adultery, is a question I prefer myself to leave open till the point arises with reference to some specific issue, the character of which may possibly be material to the inquiry that has then to be pursued. It is, perhaps, questionable whether infants have any special protection in the Divorce Court; but I express no final opinion on the subject. If the opinion at which I have arrived as to the issue of adultery had been in conflict with the practice of the learned judges in the Divorce Court, I should feel much hesitation in disturbing what, upon that hypothesis, would have been the settled course of the Court; but there seems no reason to think that interrogatories addressed solely to the issue of adultery have ever, otherwise than per incuriam, been allowed, or that, when the only issue was adultery, the practice of discovery of documents has been deliberately adopted by the judges of that Court. So far as any laxity of practice may have crept in, it has, I think, been due to the fact that other issues, besides that of adultery, are often necessarily ventilated in a divorce suit.

On the grounds above mentioned I think the appeal should be dismissed with costs.

FRY, L.J. I have had the benefit of reading the judgments delivered by my learned brethren, and cannot usefully add anything to what they have said. I agree with them, and for the reasons which they have given—that discovery ought not to be required from the litigants in a divorce suit for the purpose of proving adultery. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for petitioner: *J. B. Churchill.*
Solicitors for respondent: *Eldred & Bignold.*

H. C. J.

IN THE GOODS OF CORMACK.

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Dec. 16.

Probate—Administration Bond—Grant to Committee of Lunatic Executor—Estate found to be larger than original Estimate—Sureties allowed to give a Bond to double the amount actually in the hands of the Administratrix.

An executor, who was also sole legatee, having been found to be a lunatic by inquisition, his committee took out letters of administration for his use and benefit, and entered into a bond jointly with a guarantee society for double the sum of 4569*l.*, at which the value of the estate was then estimated. It was afterwards found that the estate was entitled to a further sum of 4492*l.*, and a second bond was required. The administratrix had paid into Court to the account of the lunatic 6823*l.*, retaining in her hands, after paying debts and testamentary expenses, 650*l.* :—

Held, that the sureties might be allowed to enter into a bond in double the amount remaining in the hands of the administratrix.

APPLICATION to dispense with the sureties of, or to limit the amount of, an administration bond.

Sophia Bashford Cormack, late of Cheltenham, in the county of Gloucester, deceased, died December 12, 1887, leaving a will duly executed, dated May 19, 1875, by which she appointed her husband, William Forster Cormack, sole executor and sole legatee.

On January 31, 1885, William Forster Cormack was found, by inquisition, to be a person of unsound mind, and by an order dated May 8, 1885, Miss Edith Gray was appointed committee of his estate. On September 28, 1888, Miss Gray, as committee of Mr. Cormack, took out letters of administration, with the will annexed, to the estate of Mrs. Cormack, for the use and benefit of the lunatic during his lunacy. At that time it was believed that the whole of the estate of the deceased, including all the assets, amounted to the gross sum of 4569*l.*; and on August 4, 1888, the administratrix entered into a bond jointly with the Law Guarantee Society in the penal sum of 9140*l.* It was subsequently discovered that the deceased's estate was entitled to a further sum of 4492*l.* gross, and it became necessary therefore to extend the grant of administration to cover that additional sum; but the administratrix found difficulties

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in obtaining sureties to join in the bond who could justify to the amount required.

The administratrix had paid into Court to the credit of the lunatic, William Forster Cormack, sums amounting to 6823*l.* 13*s.* 9*d.*, and after the payment of debts, probate duty, and other expenses, the amount actually remaining in her hands for the administration of the estate was not more than 650*l.*

Searle, moved the Court to dispense with sureties to the further bond required, or to allow the bond to be limited to the sum of 650*l.* actually in the hands of the administratrix.

BUTT, J. I cannot dispense with the sureties; but, under the circumstances, I will allow the sureties to give a bond in double the amount only of the sum not actually paid into Court, viz., 650*l.*

Solicitors: *Peacock & Goddard.*

W. L.

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Jan. 19.

[DIVISIONAL COURT.]

THE CRESSINGTON.

Admiralty—Damage to Cargo—Bill of Lading—Exceptions: Perils of the Sea occasioned by Negligence of Master—Charterparty—Condition as to Certificate of Surveyor—Insufficient Dunnage.

A cargo of wheat was shipped by charterers on board the defendants' vessel, under a charterparty and bill of lading, both of which excepted ". . . perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence . . . of the . . . master."

The charterparty, referred to in the bill of lading under the words, "all other conditions as per charterparty," contained the condition, "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water and ventilation, to be furnished to charterers from H. H. Watson, surveyor." Under this condition a certificate was furnished by the surveyor which did not specially mention dunnage, but stated that the vessel "is entitled to full confidence, can carry a dry and perishable cargo, and is a good risk for underwriters."

During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and, through the leak thereby occasioned, the cargo was damaged by sea-water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea-water. Owing to the dunnage of the waterways in

the 'tween decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged by sea-water.

In an action for damage to cargo, brought by the plaintiff, who had purchased the cargo in transit, against the shipowner:—

Held, that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuance of the leakage not being prevented; for, the inflow of water being a peril of the sea and an accident of navigation, the negligence of the master in respect of it was covered by the exception in the bill of lading:

Held, also, that the shipowner was liable for the additional damage caused by the dunnage being insufficient, as the certificate of the surveyor was not conclusive.

APPEAL by defendants, the owners of the iron sailing vessel *Cressington*, from a decision of the judge of the county court of Yorkshire, holden at Kingston-upon-Hull, whereby, in an action for damage to cargo by sea-water, he found the defendants liable for the negligence of their master, and awarded the plaintiff 126*l.* damages.

The material facts were as follows:—

By charterparty dated May 22, 1889, and made between the master, as agent for the owners, of the *Cressington*, and Balfour, Guthrie & Co. of San Francisco, the vessel was chartered to receive on board at San Francisco a cargo of wheat in bags, and proceed to Queenstown or Falmouth for orders, and thence to a safe port as ordered by charterers' agents.

The exceptions were:—

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

The charterparty also contained the following condition: "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water, and ventilation, to be furnished to charterers from H. H. Watson, surveyor."

The 'tween decks in the *Cressington* were about seven or eight feet below the main deck, and consisted of moveable planks not

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caulked, laid on the transverse beams, and two or three of these planks had been removed at the side, so as to leave openings forming wing or feeding hatches all along the side of the ship, the portion of the 'tween decks immediately close to the side consisting of two fast planks laid on a stringer running round the ship. This stringer carried a cemented gutter, or waterway, provided with roses at intervals of about 40 ft., these roses opening into pipes which ran down to the bilges.

For dunnaging the 'tween deck waterways pieces of wood were laid lengthways in the gutterways until the gutterway was roughly levelled up with the deck, and on this wood the bags of wheat were laid.

The report or certificate of the vessel having been surveyed at San Francisco in May and June, 1889, signed by the above-mentioned H. H. Watson, gave general particulars as to the date when the vessel was built, her material, dimensions, and draft. It also stated that the caulking of the decks had been tried and found hard, and concluded with the following:—

"Remarks. Entitled to full confidence, can carry a dry and perishable cargo, and is a good risk for underwriters."

The bill of lading, dated June 17, 1889, making the cargo deliverable "unto order or to its assigns," on payment of freight, contained an exactly similar exception as to the "act of God, perils of the sea, &c.," as in the charterparty above set out, and also the words, "all other conditions as per charterparty."

On June 20, 1889, the vessel sailed from San Francisco, and in August and the early part of September, when rounding the Horn, met with heavy weather, in consequence of which a rivet passing through a hole pierced in the flat foot, or flange, of a bulwark stanchion worked loose, thereby allowing the foot of the stanchion to lift. The effect of the lifting of the stanchion was to crack the cement over the rivet, and sea-water, passing under the foot of the stanchion, and through the corresponding holes for the rivet in the angle bar and stringer plate, reached the cargo.

Towards the end of September the weather improved; but no attempt was made by the master to prevent the leakage beyond mere cementing, which the vibration of the stanchion again cracked, so that the cargo was further damaged by sea-water.

On the vessel's arrival at Queenstown, the plaintiff bought the cargo, and ordered the vessel to Hull, which place she reached on December 3. It was then found that in No. 3 hold there were a quantity of bags damaged by sea-water, the damage lying close to the port side of the ship, immediately under and traceable to the rivet. This damage continued down to the 'tween decks, where the dunnage had proved insufficient to keep the bags out of the water accumulating in the waterways, so that some of the bags had become rotten, and, the grain escaping, had choked the roses, with the result that the water, extending laterally over the fast planks down the wing hatches, had damaged the cargo in the lower hold. The total amount of damage was 189*l.*

On these facts, the learned county court judge gave a judgment, the material portions of which were:—

As to the rivet: "The springing of the stanchion foot arose from perils of the seas, and was an accident of navigation; but it did not arise from the negligence or want of judgment of anybody. To cover the present case, the words should have gone on as follows: Nor damage to cargo arising from negligence and want of judgment." . . . "The proper steps to remedy the defect were not taken by the captain, and he ought, within a reasonable time after the discovery of the damage in August, to have endeavoured to remedy the defect by something more than mere cementing. An attempt might have been made to fix the stanchion foot firm by wedges and caulking." . . . "I fix September 22—when, according to the log, the captain began a long spell of fine weather—as the day when he ought to have taken steps to remedy it." . . . "No doubt much leakage occurred during the heavy weather in the early part of September and the last weeks in August, and before any remedies could be applied, and I deduct a sum of 63*l.* (from the 189*l.* total damage) as due to that period, and find a verdict for the plaintiff for 126*l.*"

As to the dunnage: "These words (referring to the condition in the charterparty) commence with the positive statement that the vessel is to be properly stowed and dunnaged. Mr. Watson's certificate has been put in; but it says nothing about dunnaging. All it says of the ship is, that it is entitled to full confidence, can carry a dry and perishable cargo, and is a good risk for under-

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writers." . . . "Even assuming that the clause in the charter-party amounted to this, that what Mr. Watson required, and no more, was to be done, would that justify the captain starting with an unseaworthy ship when the essence of the contract as stated in the document is that the ship is tight, staunch, strong, and in every way fitted and provided for the said voyage? I think not, and I so hold in this case; and therefore, if the damage has been increased in the lower hold, or in the bags lying on the waterways by the dunnaging, as I think it has, the defendants are liable to that extent, and that is an amount in money which I am bound to estimate. . . ."

"As the case may go to appeal, and I am desirous of saving a possible reference back to me, I have to consider what my verdict in figures would be, supposing the captain is exonerated from doing anything more than he did do to remedy the defect in the stanchion foot; in other words, on the supposition that I am held wrong as to the rivet point. In that alternative, the question of the dunnage comes in, and although the owners might be relieved from the damage treated as a whole, yet if the dunnage was bad they would be liable to so much extra damage as was due to the character of the dunnaging in the 'tween decks. The plaintiff makes the whole of the damage in the lower hold 151*l.* 12*s.* 1*d.* I make it about the same; and of this damage I allow the plaintiff 90*l.*, as due to the bad dunnaging, the rest I treat as due to the direct action of the rivet; so that on that alternative my verdict would be 90*l.*"

Joseph Walton, for the defendants. The damage to the cargo by sea-water due to the starting of the rivet was a peril of the sea directly covered by the exception in the bill of lading. Assuming that the master was negligent in omitting to take all possible steps to arrest the damage to the cargo arising from this cause, still as the inflow of water was the peril of the sea which the master negligently omitted to stop, the learned county court judge was wrong in holding the shipowner liable. He has treated the negligence of the master as occurring de die in diem, but the negligence consisted in failing to stop the damage by the sea-water which was entering the ship through a hole arising from a

peril of the sea, and which was therefore directly covered by the express terms of the bill of lading which excepts perils of the sea, and other accidents of navigation, even when occasioned by the negligence of the master. In *Hamilton* v. *Pandorf* (1), the damage to the cargo, due to the admission of sea-water through a hole gnawed in a pipe by a rat, was held to be damage arising from a peril of the sea, and the shipowner was protected. Here the damage to the cargo was due to the admission of sea-water through a hole arising from a peril of the sea, and which the master negligently omitted sufficiently to stop up. It was, therefore, a peril of the sea occasioned by the negligence of the master, and within the exception.

The mode adopted for dunnaging is said to have been defective; but the modes suggested for its improvement seem rather applicable to regularly laid and caulked 'tween decks. Here the so-called deck only consisted of boards to lay the cargo on, so as to keep the weight of the upper cargo off the lower, and the planks often had spaces between them. According to the evidence of the master and of the second mate, the mode of dunnaging was inspected and approved by the surveyor. According to the evidence of the surveyors, the roses always get choked and are practically useless, as are also (according to the evidence of some of the witnesses) the waterways themselves; the water therefore which came from the leak due to the rivet would, in any event, have trickled into the cargo somewhere. The mischief arose from a peril of the sea. The shipowner is not bound to anticipate all the possible mishaps that may arise, for his obligations are not based on accidents, but have regard to all ordinary risks. In the present case the dunnage was such that all ordinary risks were guarded against, and there is no evidence that if the dunnage had been different the water would not have done damage. If, however, the dunnage was not quite satisfactory, the report of the surveyor shews that it was considered sufficient, for the certificate states that the vessel is "entitled to full confidence" and "can carry a dry and perishable cargo."

[BUTT, J., referred to *Carmichael* v. *Liverpool Sailing Ship, &c., Association.* (2)]

(1) 12 App. Cas. 518. (2) 19 Q. B. D. 242.

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The charterparty defines what the obligation of the shipowner is to be in respect of dunnage. The obligation is that it shall be to the satisfaction of Mr. Watson, whose certificate was duly obtained.

[BUTT, J. That certificate is given for purposes of insurance and other purposes than that of relieving the shipowner from responsibility to the cargo owner.]

Sir Walter Phillimore, and *J. G. Witt*, for the plaintiff: The exception in the bill of lading as to the negligence of the master only refers to the immediately preceding words, "collisions, stranding, and other accidents of navigation," and not to "perils of the sea"; for if it related to the latter words it would also refer to "enemies, pirates, restraint of princes, &c.," which could not be said to be occasioned by negligence.

[THE PRESIDENT. Supposing all the words are not apposite, still this would not prevent the negligence referring to such as would be applicable.]

The straining of the vessel causing the rivet to loosen was the original source of the damage, and was a peril of the sea for which the shipowner is exempted from responsibility by the terms of the bill of lading; but he is liable for the misfeasance of the master in not taking reasonable steps to stop subsequent damage by putting something over the crack, such as canvas or tarpaulin. It is for the aggravation of the damage, which the master might have prevented, that the shipowner is liable, just as in *Notara* v. *Henderson* (1), where beans were wetted by sea-water in consequence of a collision which was an excepted peril; but the shipowner was held liable to the cargo owner for the deterioration in value of the beans caused by the master carrying them on to their destination instead of adopting the course, which was reasonably practicable under the circumstances, of unloading and drying them before re-shipment.

Secondly, the dunnage was improper. Planks should have been laid over the waterways as required by the rules in force at San Francisco in the case of iron ships carrying grain cargoes wholly in bags. (2) These rules have been approved by the

(1) Law Rep. 7 Q. B. 225.

(2) Rules and Regulations of the Marine Surveyor, San Francisco, December 20, 1877: "Where the 'tween

Board of Trade under s. 5 of the Merchant Shipping (Carriage of Grain) Act, 1880 (1), and, if the planks had been so laid, there would have been no damage in the lower hold, nor would the roses have been choked by the rotting of the bags. The certificate of the surveyor has nothing to do with this case, as the shipowners' liabilities towards the cargo owner are determined by the bill of lading, and the condition as to the certificate which is contained in the charterparty is not to be incorporated with the bill of lading: *Serraino* v. *Campbell* (2), following *Russell* v. *Niemann*. (3) Even if the certificate is taken into consideration it is not conclusive, for in *Bigge* v. *Parkinson* (4) it was held that the guarantee implied by law, in a contract to supply troops with stores, that the stores would be reasonably fit for the purpose, was not excluded by the proviso that the stores were "guaranteed to pass survey of the East India Company's officers."

Joseph Walton, in reply. The fallacy of the argument of the respondents consists in viewing the peril of the sea as only existing at the moment, whereas it continued to exist so long as damage was caused by sea-water flowing in, just as the coming in of the sea-water through the hole gnawed by the rat was a peril of the sea in *Hamilton* v. *Pandorf*. (5) The question of the non-liability of the shipowner for the negligence of the master by reason of the exception in the bill of lading was never raised in *Notara* v. *Henderson* (6), and the terms of the bill of lading were different. In *Serraino* v. *Campbell* (2) it was no doubt held, that the parties having agreed that there should be only certain exceptions mentioned in the bill of lading, other exceptions contained in the charterparty altogether overriding those exceptions, must be rejected as inconsistent, and in the

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deck is laid and caulked with combings fitted round hatchways, the deck to be dunnaged with strip and board two inches high; but where the deck is open the gutter waterway only will require to be covered with a fore and aft board."

(1) 43 & 44 Vict. c. 43. See No. 4 of the rules approved in the first schedule of the official notice issued by the Marine Department of the Board of Trade, dated May 8, 1882.

(2) 25 Q. B. D. 501, [1891] 1 Q. B. 283.

(3) 17 C. B. (N.S.) 163.

(4) 31 L. J. (Ex.) 301.

(5) 12 App. Cas. 518.

(6) Law Rep. 7 Q. B. 225.

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same way the exception contained in the bill of lading in *Russell* v. *Niemann* (1) was held only to be expanded by exceptions ejusdem generis; but here the surveyor was selected by both the original contracting parties to give the certificate in question, and that certificate must be taken to shew that there was nothing wrong with the vessel in respect of dunnage when she left San Francisco.

SIR JAMES HANNEN, President. The first question is, whether the primâ facie liability of the shipowner for the damage which arose to the cargo is removed by the exception contained in the clause. The learned judge in the Court below appears to have thought that the original source of damage was not attributable to the shipowner, but that he was liable to this extent, that, when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation. The clause, however, goes on to say, "perils of the sea and accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against. We therefore think that the learned judge was wrong in giving the plaintiff the sum of 36*l.* as representing the amount of damage due to the negligence of the master in respect of the leakage.

As to the second point, that is, the question of dunnage, we have thought it right to take the opinion of the Trinity Brethren, and they are both clearly of opinion, as we are, that the dunnage was insufficient. We entirely agree with the learned judge that Mr. Watson's certificate is not to be taken as conclusive, and therefore there will be judgment for 90*l.*, the amount of damage ascertained by the learned judge to be due to bad

(1) 17 C. B. (N.S.) 163.

dunnaging. As each party has been partly successful there will be no costs of the appeal, but the plaintiff will have his costs below.

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BUTT, J., concurred.

Solicitors for appellants: *Hearfields & Lambert, Hull, for Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for respondents: *A. M. Jackson, Hull.*

T. L. M.

LANDER *v.* LANDER.

1890 *June* 14; 1891 *Jan.* 14.

Divorce—Husband's Petition—Provision for Wife proved guilty of Adultery—Dum Sola et Casta Clause.

Provision made for maintenance of a wife proved guilty of adultery without the insertion of a dum sola et casta clause in the order.

THIS was a petition by the husband for dissolution of the marriage on the ground of his wife's adultery. The case was tried before the President (Sir J. Hannen) without a jury.

The parties were married in 1873, and there was one child of the marriage—a son—born in 1874. Shortly after her confinement the respondent became temporarily insane, and was placed in a lunatic asylum, but was discharged in the same year. The petitioner stated that he had been advised that if cohabitation were resumed, and his wife became pregnant, it would be dangerous to the health of the mother and child. It was thereupon arranged, with the concurrence of the families of the petitioner and respondent, that they should live apart, and that the petitioner should allow his wife 1*l.* a week for the maintenance of herself and child. This allowance the petitioner paid regularly until the middle of 1889. The petitioner and the respondent corresponded for some time; and in 1879 the petitioner wrote to suggest that the time had come for him to assume charge of his son. In May of that year he took him away from his mother. The respondent wrote to her husband asking for an interview, which was declined; and ultimately the petitioner replied that he would only continue the payment of the allowance on the understanding that all communications from her should be addressed

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to his solicitor. He had never held any communication with his wife from the year 1880 up to the present time.

In consequence of rumours which had come to his knowledge, in 1889 he made inquiries as to his wife's conduct, and in October of that year he presented this petition, which charged his wife with the commission of adultery with three co-respondents, resulting in the birth of four illegitimate children.

The President came to the conclusion that the petitioner was not shewn to have neglected his wife in such a way as to have conduced to her guilt, and granted a decree nisi; but intimated that he would not make the decree absolute until a provision had been made for the wife's maintenance.

Searle, in moving, on behalf of the petitioner, that the decree be made absolute, stated that the petitioner had agreed to allow his wife 15*s*. a week, but asked that the order should be to pay it to her as long as she remained chaste and unmarried.

Durley Grazebrook, for the respondent. In the circumstances of the case, and especially having regard to the fact that the husband had not lived with his wife since 1873, no such condition should be embodied in the order.

THE PRESIDENT. I make the decree absolute; but as it is a question, not of a large income, but of a bare allowance for the wife's support and maintenance, I do not think it necessary in the circumstances of this case to insert a dum sola et casta clause in the order.

Solicitors for petitioner: *C. O. Humphreys & Co.*
Solicitors for respondent: *Ross & Co.*

W. L.

WITT *v.* WITT.

1891
Feb. 17.

Divorce—Wife's Petition—Custody of Children—Permanent Maintenance—Application to rescind or vary Order—Unfitness of Mother—Custody given to the Father.

A decree for dissolution of marriage having been made on the wife's petition on the ground of the husband's adultery and cruelty, the custody of the children of the marriage was given to the petitioner, and the respondent was ordered to pay the petitioner for her maintenance the sum of 75*l.* a year. The petitioner took charge of one child, a girl of eleven years of age, but allowed the respondent to retain the other, a boy of fifteen. Subsequently the respondent applied to rescind or vary the order, and on an inquiry before the registrar it was shewn that the petitioner was no longer a fit person to have charge of her daughter. The Court made an order transferring the custody of the daughter to the father, who had married again and was shewn to be leading a respectable life, but declined to reduce the amount of the wife's permanent maintenance.

APPLICATION to rescind or vary an order for the custody of children, and to reduce the amount of permanent maintenance which the husband had been ordered to pay to his wife.

A decree absolute was made on January 22, 1889, on the petition of the wife, dissolving the marriage on the ground of the husband's adultery and cruelty, and the custody of the two children of the marriage—a son aged fifteen years, and a daughter aged eleven years—was given to the petitioner. On February 18, 1889, an order was made by consent that the respondent should pay 75*l.* a year for the maintenance of the petitioner. The son, however, remained in the custody of the father, who married again, while the mother took charge of the daughter.

On December 16, 1890, a motion was made on behalf of the respondent to rescind or vary the order as to custody, on the ground that the petitioner was an unfit person to have charge of her daughter, and to reduce the amount ordered to be paid for maintenance, and both points were referred to the registrar to report upon.

From the registrar's report it appeared that evidence was brought before him that the petitioner since the divorce had lived at various places with her daughter under the name of Mrs. Seymour, and that in each house there had lived a young man named Wheale, who, though he had occupied a separate room

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of his own, was on such intimate terms with the petitioner as, in the absence of explanation, to lead to the conclusion that they lived together as man and wife. The petitioner was given to drink, completely neglected her daughter's education, and was in the habit of sending her out late in the evening. It also appeared that the respondent had married again; and an affidavit was produced from the clergyman of his parish to the effect that he was leading a respectable life, and was a fit person to have charge of his daughter.

The registrar was of opinion that the wife was an unfit person to have the custody of her daughter; and if he did not recommend that the charge of the daughter should be handed over to the husband, it was because it was unusual to give the custody of children to a father proved to have been guilty of adultery. He was therefore of opinion that the custody of the girl should be given to a Mrs. Elizabeth Price, a school-mistress of Billericay, Essex, who had been suggested, and as to whose fitness and willingness to undertake the charge the registrar was satisfied. As to the reduction of the allowance, the registrar reported that it was asked for on the ground that the amount of 75*l.* was fixed on the supposition that the mother would have the custody of her daughter, and was subject to reduction if she was relieved of the charge. But he was of opinion that there was no evidence of this, and the order expressly stated that it was for the maintenance of the petitioner. Neither was there any evidence that the respondent's means had diminished, and he was on the whole of opinion that there ought to be no reduction. The petitioner did not appear before the registrar nor on this motion, as her address could not be discovered and no notice could be served on her.

L. D. Powles, for the respondent. As to the first point, the Court will be guided solely by what appears to be the best course in the interests of the child: *Symington* v. *Symington*. (1) As to the reduction of the allowance, although by rule 92 the application should be made by petition, there can be no reason why the Court should not entertain it on this motion. When the

(1) 2 H. L., Sc. 415.

amount of 75*l.* was fixed it was on the understanding that the mother would have the custody of the child, and if she is relieved from the burden of its maintenance the amount should be reduced.

JEUNE, J. The most important of the two questions is that relating to the custody of this girl; and I feel a little difficulty about it, because as far as I am informed there seems to be no precise case known in which after custody has been given to a wife, being the innocent party, after a final decree of dissolution, an order has been made giving the custody to the husband. It is obvious that this ought to be done only in exceptional cases. As long ago as 1875 it seems to have been held in *Symington* v. *Symington* (1), in the House of Lords (a Scotch case, but the language of the Scotch Acts is substantially the same as that of the English Acts), that no hard and fast rule should be laid down as to the custody of children, but that in every case the Court is bound to do what it conceives to be for the best interests of the children. In the present case, I have come to the conclusion that it is for the interests of this child that the father should have the custody of her. The mother obtained the custody in the ordinary way. But the state of things as it presented itself at the time of the divorce appears now to be entirely altered. She has gone away; she is not represented here, and the sworn testimony against her must be taken to be true. On that it appears that she is no longer a fit person to have the custody of her daughter, and therefore, if it is possible, it is desirable that the daughter should be taken away from her. Two alternatives are presented to me: I may either give the child to the custody of Mrs. Price, whose name has been suggested, or, if the father is shewn to be a fit person, I may give the custody to him. I think, if it be practicable, that it would be far better for the child that the father should have charge of her, rather than a stranger. Strong evidence has been given by persons whom there is no reason to doubt as to the fitness of the father. He seems to have married again, and is leading a perfectly respectable life, and, that being so, it

(1) 2 H. L., Sc. 415.

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appears to me to be for the interests of this child that she should be removed from the custody of the mother and placed under the charge of her father. With regard to the reduction of the maintenance, I think I ought to make no order. It may be, as Mr. Powles suggested, that I could make such an order now without the formality of a petition. On that I express no opinion; but I think no order should be made. The original order does not shew that the 75*l.* a year was not for the maintenance of the mother alone, and I ought to have some materials to shew that the sum is too large. No such materials have been laid before me, and under the circumstances I do not think that I should vary the order for maintenance.

Solicitor: *Lewis Pass.*

W. L.

Feb. 3, 10.

MICHELL *v.* MICHELL.

Restitution of Conjugal Rights—Husband's Petition—Refusal of Wife to comply with the Decree—Application for settlement of Wife's Separate Estate for benefit of Husband—Property already settled to her separate use without Power of Anticipation—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.

A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, application was made under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), for a settlement of her property for the benefit of the husband and of the children of the marriage, when it appeared that the whole of the wife's property had been settled on the occasion of the marriage to her separate use without power of anticipation:—

Held, that the restraint on anticipation did not prevent the Court from ordering a settlement to be made of the wife's property under s. 3 of the Act.

APPLICATION under s. 3 of 47 & 48 Vict. c. 68, for a settlement of the wife's separate property for the benefit of the husband, who had obtained a decree for restitution of conjugal rights which she had refused to obey.

The decree for restitution of conjugal rights was pronounced on May 9, and was served on the respondent on July 11, 1890; but she had not complied with it.

The respondent was a widow at the time of her marriage with the petitioner, and at the date of the application two children

by her first marriage were living—a daughter twenty-two years of age, and a son seventeen years of age. There were two children of the second marriage, both of whom were in the custody of the petitioner. Prior to the marriage, a settlement had been executed, the funds comprised in which were wholly the property of the respondent, being a portion of the estate of her first husband. By the settlement, the income derived from the fund was to be paid to the respondent for her life for her separate use and without power of anticipation. After her death the capital was to be held as to one portion of it upon trust for the children of the first marriage, and as to the remainder on trust for the children of the marriage of the petitioner and respondent if they should attain the age of twenty-one, or, being daughters, should marry under that age, and, failing the said trust, upon trust for the children of the first marriage.

The registrar, to whom the petition for maintenance was referred, reported that the income of the wife was 540*l.* and of the husband 80*l.*, being the amount of a pension to which he was entitled. At one time he had an income of 450*l.* derived partly from investments valued at 1800*l.*, and partly from literary work, examinations, and pupils; but owing to unsuccessful dealings with his investments they had become valueless, and his literary and scholastic work had entirely failed him.

On the motion being called on,

Inderwick, Q.C. (*Trollope*, with him), for the respondent, took a preliminary objection that the Court had no jurisdiction to make any such order as that applied for by the petitioner. The only authority which the Court has to deal with the wife's property in such a case as this is conferred by s. 3 of the Matrimonial Causes Act of 1884, which was intended to relieve the Court from the scandal arising from the imprisonment of a husband or wife who had refused to comply with a decree for the restitution of conjugal rights. Sect. 3 enables the Court to deal with property in possession or reversion, or with the profits received from any trade or earnings. But the section does not give the Court any power over the property of the wife where it is settled upon her for her separate use without

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power of anticipation. The Act 20 & 21 Vict. c. 85, did not give the Court power to deal with settlements, *Norris* v. *Norris* (1); and the Act 22 & 23 Vict. c. 61, s. 5, was passed to give such power to the Court. But the power is confined to suits for dissolution and nullity of marriage where the parties are restored to the position of unmarried persons. In cases of restitution of conjugal rights the Court can only proceed under s. 3 of the Matrimonial Causes Act of 1884. In the present case there are no profits or earnings which can be made the subject of an order; the Court has only the property comprised in the marriage settlement to deal with. The Court cannot make an order on an income which is under restraint against anticipation.

[JEUNE, J. How do you account for there being no provision for cases where the wife's estate is subject to that restriction?]

They may have been omitted by inadvertence. *Swift* v. *Swift* (2) does not apply, because there only a portion of the property is stated to have been subject to restraint on anticipation.

[JEUNE, J. There the Court seems to have got rid of the objection by assuming that if it found the wife in possession of money it could make an order on her without inquiry as to where the money came from.]

In *Hyde* v. *Hyde* (3) the Lords Justices held, that even in cases of sequestration no order could issue against a woman's separate property if it were subject to restraint on anticipation. [He referred also to *Leak* v. *Driffield* (4) and *Harrison* v. *Harrison.* (5)]

Bayford, Q.C. (*Martyn,* with him), for the petitioner. If the interpretation contended for is to prevail the Act will in many cases become a dead letter. But *Swift* v. *Swift* (2) completely covers the present case. The effect of restraint on anticipation has been considered frequently where sequestration was applied for, and the Court granted the application in such cases. [He referred to *Seatle* v. *Seatle* (6); *In re Andrews* (7); *In re Glanvill* (8); *In re Keane* (9); *In re Dixon.* (10).]

Inderwick, Q.C., in reply. The cases cited merely go to shew

(1) 1 Sw. & Tr. 174.
(2) 15 P. D. 118.
(3) 13 P. D. 166.
(4) 24 Q. B. D. 98.
(5) 13 P. D. 184.
(6) 30 L. J. (P. & M.) 216.
(7) 30 Ch. D. 159.
(8) 31 Ch. D. 532.
(9) Law Rep. 12 Eq. 115.
(10) 35 Ch. D. 4.

that the Court has disregarded the restraint on anticipation where it was shewn to be for the benefit of the wife that such a course should be adopted.

Cur. adv. vult.

JEUNE, J. The petitioner, the husband, in this case has obtained an order for the restitution of conjugal rights which the respondent refuses to obey, and this is an application under the 3rd section of 47 & 48 Vict. c. 68, for an order that the respondent's property, or part of it, may be settled for the benefit of the petitioner and of the children of the marriage. The registrar has reported that the only property of the wife consists of an income of 540*l.* a year under the marriage settlement, by which that income is settled to her separate use without power of anticipation. It has been contended before me, that under these circumstances the Court has no jurisdiction to make the order asked for. It is said that the language of s. 3 of the Act 47 & 48 Vict. c. 68, so far as is material in the present case, is identical with that of s. 45 of 20 & 21 Vict. c. 85; that it has been held in the case of *Norris* v. *Norris* (1), by Lord Campbell and the Judges sitting with him, that the words in the latter statute gave the Court no power to interfere with marriage settlements, and that the correctness of this decision has received Parliamentary recognition, because in the Act 22 & 23 Vict. c. 61, express power was given to make orders, after a final decree of nullity or dissolution, with reference to the application of settled property for the benefit of children of the marriage or their parents. It is said, on the other side, that so to read this 3rd section would reduce it to a dead letter in many cases. It is no doubt strange if it be the case that the Court cannot under this section make any provision for the husband where the wife's property is all in settlement. The provisions of the section are consequential on the alteration of the law effecting a prohibition of the enforcement of an order for restitution of conjugal rights by attachment. Under the old law, before the Divorce Acts, and by s. 52 of the Divorce Act of 1857, the Court could enforce restitution of conjugal rights by attachment. But when

(1) 1 Sw. & Tr. 174.

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attachment for enforcement of an order for restitution of conjugal rights was abolished, it was thought necessary to accomplish otherwise what, no doubt, was often the object of application for restitution, and to provide means of preventing a husband or wife who refused to return to cohabitation from monopolizing the enjoyment of property from which, in cohabitation, both would, or might, derive benefit. It would, no doubt, defeat such objects in many, if not in most, cases if a wife, who insisted on remaining away from her husband, retained the sole enjoyment of the property settled on her; and Mr. Inderwick could not suggest any ground for the power conferred on the Court being so narrowed except casus omissus. Still, on the words of s. 3, I do not hesitate to say that I should have felt a difficulty in making any order in this case if there was not, as I think there is, a precedent which I ought to follow. I do not think that the case of *Seatle* v. *Seatle* (1) helps us, although the order in that case seems designed to avoid alteration of the settlements, because that was decided after the Act 22 & 23 Vict. c. 61. But a similar petition to that in the present case was presented in the case of *Swift* v. *Swift*. (2) The wife's property there consisted of the sums of 227*l.* 16*s.* 8*d.*, and 73*l.* a year, subject to the trusts of the marriage settlement, and 520*l.* from property bequeathed to the wife by her father in trust for her separate use without power of anticipation. The registrar submitted that the Court had no power in such a case to vary the settlements made on the marriage, or to order any payment to be made out of the income enjoyed by the wife under the will of her father. Butt, J., however, held as follows: "I agree that I cannot alter the marriage settlement, and if I were asked to do it I should refuse. But if I find the lady in possession of an income, I need not ask where she derives it from. I can order that out of it she pay a certain sum annually to her husband. I have no hesitation in making such an order in this case." Subsequently, Lord Hannen on the matter coming before him to carry out Butt, J.'s decision (3), directed that a settlement of the wife's property should be drawn up in order to secure a yearly income to the husband out of the wife's property. It appears, therefore,

(1) 30 L. J. (P. & M.) 216. (2) 15 P. D. 118. (3) Ante, p. 129.

to be held, that an order that a wife should pay a certain sum annually to her husband out of the settled property, and that such payment should be secured by settlement, is not an alteration of the marriage settlement. It was argued before me that the judgment in *Swift* v. *Swift* (1) does not govern the present case, because there only part of the settled property was subject to restraint on anticipation, and here all is, and the sum, in fact, allotted by Lord Hannen might be paid out of income not subject to restraint on anticipation. But it does not appear that either Lord Hannen or Butt, J., drew any distinction between the part of the property settled with restraint on anticipation and the remainder, though, as I am informed, the point was raised before both the learned judges. And, on what I take to be the principle of Butt, J.'s judgment, there would seem to be no such distinction.

No doubt, as was urged before me, the Court of Appeal has decided that sequestration cannot issue against property of a married woman in settlement with restraint on anticipation: *Hyde* v. *Hyde* (2); for the reason, as stated by Bowen, L.J., that it would be doing indirectly what cannot be done directly, if the Court were to allow a married woman to cause to be anticipated by her own conduct income as to which she is restrained from anticipation. It is, however, to be observed that in certain cases the Court has made orders directing payments of income derived from property settled with restraint on anticipation: see *In re Andrews* (3); *In re Keane.* (4) But it appears to me that, if, as Butt, J. has decided, to order an annual payment and secure it by settlement, does not alter the existing settlement under which the property is held, it is not material whether such settlement contains a clause restraining anticipation or no. I am therefore prepared to proceed with this case in order to determine what sum, if any, is to be annually paid to the husband.

Objection overruled.

Solicitors for the petitioner: *Day & Cather.*

Solicitors for the respondent: *Ingram, Harrison, & Ingram.*

(1) 15 P. D. 118.
(2) 13 P. D. 166.
(3) 30 Ch. D. 159.
(4) Law Rep. 12 Eq. 115.

W. L.

1890
Nov. 4.
1891
Jan. 27.

IN THE GOODS OF STREATLEY.

*Probate—Will—Attestation—Signatures of Witnesses in the Margin of Will—Subscription—*1 *Vict. c.* 26, *s.* 9.

The attesting witnesses to a will signed their names in the margin of the first and second sheets opposite to certain amendments:—

Held, following *Roberts* v. *Phillips* (4 E. & B. 450), on proof that the witnesses signed with the intention of attesting the testator's signature, that this was a valid subscription within the requirements of s. 9 of the Wills Act, and that the will might be admitted to probate.

APPLICATION for probate.

John Streatley, late of Cold Ash, Thatcham, in the county of Berks, died on January 22, 1890, leaving a will undated but executed on some day in the month of February, 1882. The will was written on the first and second pages of a sheet of foolscap paper. On the first page, a few lines down, the name of John Hawkins of Bucklesbury had been substituted as executor for the name of Frederick Povey of Newbury; and the same alteration had been made on the second page, on the fifth or sixth line from the bottom. The attesting witnesses had signed their names in the margin opposite this alteration on both pages. There was a full attestation clause at the end of the will, and the testator had signed his name opposite to it; but the attesting witnesses had not signed there. From the evidence on examination and cross-examination of the attesting witnesses, James Strand and Tom Strand, it appeared that on a day in February, 1882, the testator called them into his house, and asked them to witness his will. He produced the will, and said he wished them to attest his signature. He then wrote his name in the presence of both of them, and they wrote their names where they were told, opposite the alteration on both pages, intending thereby to attest his signature, and fully believing that they had done so. Nothing was said to them about the alterations.

The case came before the Court originally on November 4, 1890, but was adjourned in order that the next of kin might be represented, and on account of the poverty of the estate the

Court, all parties consenting, allowed the question to be decided on motion instead of requiring the will to be propounded.

Bargrave Deane, for the executors, moved for probate. Sect. 9 of the Wills Act requires that the attesting witnesses shall "subscribe" the will in the testator's presence, and in the presence of each other; and, in *Roberts* v. *Phillips* (1), Lord Campbell was of opinion that "subscribed" in the Wills Act meant not "written underneath," but "written upon the will," and that it did not matter where they signed, as long as the Court was satisfied that they signed meaning to attest the will. [He referred also to *In the Goods of Davis* (2) and *In the Goods of Wilson.* (3)]

W. G. Fellowes, for the next of kin, opposed the application, and cited *Ewen* v. *Franklin.* (4)

BUTT, J. The authority of *Roberts* v. *Phillips* (1) does not appear to have been reversed, and I think I must follow it. Probate will, therefore, go.

Solicitors for executors: *Mander & Thorncliffe, for Mecey & Sons, Thatcham.*

Solicitors for next of kin: *Mander & Thorncliffe, for W. K. Belcher, Newbury.*

(1) 4 E. & B. 450.
(2) 3 Curt. 748.
(3) Law Rep. 1 P. & D 269.
(4) Deane's Ecc. Rep. 7.

W. L.

1891
Feb. 10.

ASKEW v. ASKEW.

Probate—Administration pendente lite—General Grant reduced to a Limited Grant.

An administrator pendente lite, who was also the executor of the will in dispute, had taken out a general grant of administration, but found a difficulty in obtaining sureties to the administration bond to the full amount of the testator's estate:—

Held, that the grant might be limited to the amount to be received in respect of two mortgages which were about to be paid off, together with the amount of one half-year's dividends on certain shares, such mortgage debts and shares forming part of the estate of the deceased.

MOTON to dispense with sureties, or in the alternative to substitute a limited for a general grant of administration pendente lite.

The plaintiff, as executor, propounded the last will and testament, dated November 4, 1890, of H. W. Askew, late of Walton-on-Thames, in the county of Surrey, who died November 22, 1890. The defendant, who was the eldest son and heir-at-law of the deceased, opposed probate on the ground that the will was not duly executed, that the testator did not know and approve of the contents of the will, and that he was not of sound mind, memory, and understanding at the time of the execution. The estate of the testator consisted of freehold houses, land, and coal mines; and of personalty to the amount of 57,000*l.*—mortgages, and shares in joint-stock companies, and cash in the hands of his bankers.

The plaintiff had taken out a general grant of administration pendente lite of the personal estate, and had been appointed receiver of the real estate, but found it difficult to obtain sureties to join in an administration bond for so large an amount.

Barnard, accordingly moved for leave either to dispense with sureties or to limit the grant of administration to the receipt of two sums of 4300*l.* and 600*l.* lent on mortgages which were about to be paid off, and also to the receipt of one half year's dividends on certain shares.

JEUNE, J. I cannot dispense with sureties; but I can limit the grant of administration as you ask, which will reduce the bond to double the amount of the two specific sums you have mentioned, and of the income which the administrator will receive on the shares in the next six months.

Solicitors: *Harrison & Powell.*

W. L.

THE RIALTO.

Jan 31

Admiralty—Salvage—Inequitable Agreement—Grounds for Setting Aside.

The fact that the parties to an agreement for salvage services about to be performed on the high seas have not contracted on equal terms will not in itself invalidate such an agreement; but if, in addition to the master of the vessel about to be salved being at a disadvantage, the sum insisted upon by the intending salvor is, in the opinion of the Court, exorbitant, the necessary elements exist for setting aside the agreement as inequitable.

ACTION by the owners, master, and crew of the steamship *Coomassie* against the owners of the steamship *Rialto*, her cargo and freight, to enforce an agreement to pay 6000*l.* for salvage services, or, in the alternative, for an award of salvage.

The facts, so far as material on the question of setting aside the agreement as inequitable, were as follows:—

On December 17, 1890, the *Rialto*—a screw steamer of 1799 tons register, with crew of thirty-seven hands all told, a general cargo, and 250 head of cattle, from Baltimore to Antwerp—broke her main shaft. During the next week she made about 165 miles to the eastward under canvas, and on December 25, when in latitude about 49° N. and longitude 16° W. she was observed making signals of distress by the *Coomassie*, a screw steamer of 1710 tons register, engines of 240 horse-power nominal, working up to 1200, a crew of thirty hands all told, and a cargo of cotton from New Orleans to Havre.

The *Coomassie* bore down upon the *Rialto*, and the latter vessel sent a boat with a mate to the *Coomassie*. The evidence was conflicting as to what actually passed between the mate of the *Rialto* and the master of the *Coomassie*; but the mate returned to his vessel, whilst the *Coomassie* was manœuvred round the *Rialto* within hailing distance, and the master of the *Rialto*,

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understanding that the master of the *Coomassie* would not assent to the sum to be paid for towage being left to be settled between the owners, declined the services of the latter vessel. Thereupon the master of the *Coomassie* moved the handle of the telegraph communicating with the engine-room to full speed ahead as if to leave the *Rialto*. Upon this, the master of the *Rialto*, thinking he was going to be abandoned, hailed the master of the *Coomassie* to come on board his vessel, which the latter did, bringing with him an agreement already prepared, by which the master of the *Coomassie* undertook to tow the *Rialto* to the nearest port or anchorage, Falmouth preferred, for 6000*l.*

After the agreement was signed, the *Coomassie* proceeded to take the *Rialto* in tow. The weather was fine, the wind northerly and light, but there was some swell, and in getting one of the hawsers on board the *Coomassie* the heaving line got round the blades of the propeller, and, whilst the line was being cleared, the engines of the *Coomassie* had to be stopped, causing risk of collision. A short time after the towage had commenced one hawser parted but was again made fast, and a speed of five to six knots attained, which was subsequently increased to seven knots. On the next day the wind went round to the eastward, and by the following day had freshened into a strong breeze; but by 8.10 A.M. on December 28 the vessels were in Falmouth outer roads, where the *Rialto* being in safety, with a tug in attendance, the *Coomassie* (having towed the disabled steamer about 430 miles in three days) cast off the *Rialto's* rope, and proceeded on her voyage.

The values were: *Rialto*, 14,000*l.*; cargo, 23,673*l.*; freight, 1095*l.*; total, 38,768*l.* *Coomassie*, 40,000*l.*; cargo and freight, 83,000*l.*; total, 123,000*l.*

Sir Walter Phillimore, and *J. P. Aspinall*, for the plaintiffs. The real question between the two masters was not as to amount, but as to signing an agreement at all. The master of the *Coomassie* wished to have an agreement signed; the master of the *Rialto* wished that the matter might be left open. The master of the *Coomassie* was fully justified in insisting on an agreement as the owners of salving vessels want a definite sum fixed, if possible.

[BUTT, J. The agreement was undoubtedly obtained from a man in difficulties, and the question of law is how far it is binding.]

It lies with the defendants to shew that the agreement is inequitable, for such an agreement, made between competent persons, and with no misrepresentation of facts, will be upheld if the sum is anywhere near what the Court would think not exorbitant, and, under the circumstances, considering the risk always attending ocean towages by large steamers, the long distance towed, and the large values, 6000*l.* was a reasonable sum.

Sir Charles Hall, and *F. W. Raikes*, for the defendants. In the case of *The Mark Lane* (1), which was very similar to this, it was laid down that it was not necessary to shew the amount of duress required to invalidate an agreement at common law, and it was held that the agreement to pay 5000*l.*, having been made under compulsion, could not be enforced, and the sum of 3000*l.* was awarded to the salvors.

The master of the *Coomassie* acted in such a way as to lead the master of the *Rialto* to believe that he would be abandoned to his fate. The agreement was therefore obtained under compulsion and should be set aside. The services were rendered in fine weather, the *Coomassie* never had occasion to lower a boat, there was no difficulty experienced in the towage, a considerable speed was able to be maintained throughout, and the engines of the *Coomassie* were not strained. The sum is therefore altogether out of proportion to the nature of the service rendered. In *The Medina* (2) the agreement to pay 4000*l.* was set aside as inequitable and obtained by compulsion, 1800*l.* being awarded without costs.

Sir Walter Phillimore, in reply. *The Mark Lane* (1) is not a parallel case, because it was complicated by the stipulation that the salvor was to be paid for work done, even if unsuccessful. The values were much smaller, and the towage was nearly 100 miles less. The circumstances in *The Medina* (2) were peculiar, as that vessel was wrecked in the Red Sea, and the salvor refused to take the 550 pilgrims off the rock on which

(1) 15 P. D. 135. (2) 2 P. D. 5.

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they had taken refuge, unless the master of the *Medina* would agree to pay the whole 4000*l.* that their passage-money amounted to, from Sumatra, the original starting place, to Jedda.

[The case of *The Silesia* (1) was also referred to.]

BUTT, J. The first question is, whether the agreement referred to in the statement of claim, and put in in evidence, should be upheld. It is an agreement signed by the masters of these two vessels, by which the master of the *Coomassie* contracts to tow the *Rialto* to the nearest port or anchorage, Falmouth preferred. The vessel was towed, or at all events would have been towed, if the master of the *Rialto* had chosen to insist on further towage, to an anchorage, and an anchorage outside Falmouth. The contract, if it was a contract, was therefore performed. The services were well performed, and, according to the agreement, the amount to be paid for the services is 6000*l.*

It does not appear that there was any such bad weather as would seriously enhance the risk to the salvors or to their vessel; but the value of the property of the salvors engaged in the service was large.

It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature, and made in such circumstances, is less than the duress required at common law to invalidate an agreement, and the question is: What amount of duress will have that effect? Again, the effect of the decided cases is to shew that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: What is an inequitable agreement in cases of this sort? On this point two ingredients are commonly referred to. First, the parties contracting must be shewn not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—

(1) 5 P. D. 177.

that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement. Now, I have no doubt that the parties stood, as they usually do in such cases, upon unequal terms. The question that follows is: Is 6000*l.* a wholly unreasonable, or, in other words, an exorbitant sum? I think it is, and, therefore, it seems to me that the two things necessary to invalidate the agreement exist here. That being so, and that being a matter entirely for me, the next question is: What amount should the salvors receive? That depends on the usual considerations applicable to cases of this sort.

[The learned judge then dealt with the evidence as to the nature of the towage, viz., the large size of the two vessels, the risk always attending the manœuvring to get into position to tow a disabled vessel, the rope actually getting round the propeller of the salving vessel, the weather during the towage, the time occupied in towing, and the distance towed, and continued:—]

My opinion, after consulting the Elder Brethren, is that the proper award would be 3000*l.*; and as the owners of the property were the principal salvors, I follow the usual practice, when asked to apportion, and give them three-fourths, viz. 2250*l.* The master will have 250*l.*, and the remaining 500*l.* will be divided amongst the officers and crew, according to their rating.

With regard to costs, as the plaintiffs have recovered a large sum on their alternative claim, I shall follow the practice in the other Divisions, and allow them their costs.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., agents for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Pritchard & Sons.*

T. L. M.

1891
Jan. 27.

THE MARIANNE

Admiralty—Necessaries—Action in rem against Foreign Ship for brokerage—The Admiralty Court Act, 1840 (3 & 4 *Vict. c.* 65), *s.* 6.

There is no jurisdiction to entertain an action in rem against a foreign ship for brokerage on a charterparty, such a claim not falling within the meaning of the word "necessaries" in s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65).

MOTION by the owner of the Swedish barque *Marianne*, appearing as defendant in an action in rem for alleged necessaries, to set aside the writ and stay all further proceedings for want of jurisdiction.

On December 27, 1890, the plaintiffs, Lloyd, Lowe & Co., issued a writ against the owners and parties interested in the barque *Marianne*, indorsed as follows:—

"Statement of claim. The plaintiffs supplied necessaries and did certain necessary work as shipbrokers for the Swedish barque or vessel *Marianne*.

"The following are the particulars:—

	£.	s.	d.
"1890. Dec. 11. To amount due at date as brokerage on procuring a charterparty for the said vessel from Pensacola to Oran, 2½ per cent. on 875*l.* 8*s.*	21	17	8
"Charter stamps and copies . . .		5	6
"Brokerage on voyage from Laurvig to Sutton Bridge, 1¼ per cent. on 488*l.* 11*s.* 11*d.* .	6	2	2
"Charter stamps and copies . . .		5	6
	28	10	10

"The plaintiffs will also claim interest on 28*l.* 10*s.* 10*d.*

"The plaintiffs will also claim bail for the said amount and interest and costs."

On January 1, 1891, the defendant, as owner of the barque *Marianne*, entered an appearance under protest, and bail in the sum of 400*l.* was given to answer judgment in the action.

Barnes, Q.C., and *Balloch*, for the defendant. There is no jurisdiction for the issue of a writ in rem and arrest of a foreign vessel for broker's commission on a charterparty. The words of s. 6 of the Admiralty Court Act, 1840 (1), are "necessaries supplied," or "furnished," that is, things necessary and actually wanting for the service of the vessel at the time when they were supplied, and, strictly construed, the term applies only to anchors, cables, rigging, and matters of that description, though the meaning was subsequently extended to include money expended upon necessaries wanting at the time, the test being whether the expenses are such as are fit and proper for the vessel upon her voyage, and such as a prudent owner would, under the circumstances, incur: Abbott on Shipping, 5th ed., p. 102, citing *Webster* v. *Seekamp*. (2)

In the case of *The Riga* (3), a claim for 48*l.* for brokerage for negotiating a charterparty was allowed to go to proof; but no decision was given as the claim was ultimately included by consent in a settlement of the balance of freight. In the *Henrich Björn* (4), the point was not gone into in the Court of Appeal, or in the House of Lords, but in the Court below (5) the claim for 68*l.* 6*s.* 8*d.* for premiums of insurance paid by the plaintiffs, shipbrokers, was disallowed, the President (Sir James Hannen), in his judgment, saying (at p. 153), "the insurance of a vessel is something quite extraneous to its equipment for sea, and, however prudent it may be for an owner to insure, it is a prudence exercised for his own protection, and not for the requirements of the vessel in the sense in which the word 'necessaries' is used in the statute." No doubt it may be necessary to charter a ship, but it is not strictly a necessary to enable the vessel to prosecute a voyage, the claim by a broker for commission being a personal debt arising out of the broker having effected a contract about the ship between the owner and somebody else; but the plaintiff

(1) 3 & 4 Vict. c. 65, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims . . . . for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas at the time when the . . . necessaries (were) furnished."

(2) 4 B. & Ald. 352.

(3) Law Rep. 3 A. & E. 516.

(4) 10 P. D. 44; 11 App. Cas. 270.

(5) 8 P. D. 151.

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did not in the words of the writ supply "necessaries for the vessel." In the case of the first portion of the claim for alleged brokerage, amounting to 21*l.* 17*s.* 8*d.*, the vessel was on her way out to Pensacola when the charterparty dated December 31, 1887, in respect of the return voyage, was effected, and therefore the subject-matter of the claim was not a necessary supplied or furnished to her, she being in fact at the time at sea. A similar remark applies to the second portion of the claim, as the charterparty dated April 12, 1889, was in respect of the return voyage to Sutton Bridge from the place to which the vessel was at the time proceeding. In *The Onni* (1), an advance of money under a contract to pay off outstanding claims on the ship in consideration of receiving brokerage was disallowed, as not being within the statute, and all the cases shew that the word "necessaries" in the statute has a limited meaning.

Sir Walter Phillimore, for the plaintiffs. The *Henrich Bjorn* (2) decides no more than that the statute does not give a maritime lien for necessaries supplied to a foreign ship in an English port, but only a right to seize her on the institution of an action. It did not further define the meaning of the word "necessaries," and though Sir James Hannen in that case held (3) that insurance, however expedient, is not necessary, still, as a ship cannot be profitably employed unless she is chartered, the broker's commission is reasonably necessary, and it will work great hardship upon those transacting business in this way with foreign shipowners if they cannot make use of a proceeding in rem. In *The Riga* (4) Sir Robert Phillimore said (at p. 522) that there is no distinction as to necessaries between the cases in which by the common law a master has been holden to bind his owner, and suits for necessaries instituted in this Court, and he allowed a claim for insurance for freight, and also allowed the claim for brokerage to go to proof, no doubt reserving his judgment because it might turn out that it was not right, under the circumstances, to have chartered the ship.

[BUTT, J. The payment in that case appears to have arisen out of the practice when proceeds are in Court representing the

(1) Lush. 154.
(2) 11 App. Cas. 270.
(3) 8 P. D. 151.
(4) Law Rep. 3 A. & E. 516.

res, to distribute the residue amongst other claimants after those having a maritime lien have been paid.]

No doubt, but the case is a distinct decision that the claim was admissible. Anything necessary for the voyage is a necessary.

[BUTT, J. This claim is not in respect of any necessary for *the* voyage, but for the next voyage. Could the claim be supported in respect of the next voyage after that, and so on ?]

Whatever a prudent owner would order at the time for the purpose of the employment of his ship, would be a necessary without reference to the position of the ship when the order was given.

[He referred to *The Andalina.* (1)]

BUTT, J. The claim in this action is for brokerage for procuring two charterparties for the vessel which has been proceeded against. In both cases, the charter was not for the voyage then in course of prosecution, nor was the ship in port and about to sail on the voyage; but the ship was on the high seas performing another contract, and the charter was for the hire of the ship after that voyage was terminated.

The claim is based on s. 6 of the Admiralty Court Act, 1840, by which jurisdiction is given to the Court of Admiralty over claims for necessaries supplied to any foreign ship, and the question is, now that the Judicature Acts have merged all the Courts into one, whether in any division of the High Court such an action as this could be entertained. Formerly, claims for necessaries were held to be limited to repairs, anchors, chains, and the like, actually furnished to the ship as a necessary part of her and of her equipment. No doubt the meaning of the word was subsequently extended, so as to include under the head of necessaries claims for money expended for the use of the ship; but I feel confident that no Court in this country has ever decided that a claim for a sum not expended for the voyage in progress or about to be immediately undertaken comes within the meaning of the word "necessaries." Even if there had been such a decision I should have great doubt whether broker's commission on a charterparty could be included.

(1) 12 P. D. 1.

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THE MARIANNE.

Butt, J.

I think I should be carrying the definition of the word far beyond what any of the Courts have done, if I held that brokerage comes within the meaning of the word "necessaries," and therefore, being of opinion that I have no power to entertain a suit in rem in respect of this claim, the writ must be set aside and all subsequent proceedings stayed with costs.

Balloch, for the defendant. The plaintiff should be condemned in the damages asked for by the notice of motion. Expenses have been incurred in putting in bail, and loss was sustained owing to the detention of the vessel through being unjustifiably arrested, just as she was about to sail.

BUTT, J. The fact that the notice of motion included a claim for damages was not pressed upon my attention during the argument. No order will be made as to damages; but the parties interested will be at liberty to take any action they may be advised.

Solicitor for the plaintiffs: *Robert Greening.*

Solicitors for the defendant: *Thomas Cooper & Co.*

T. L. M.

Feb. 5, 6.

THE TALBOT.

Admiralty—Collision—Vessel carrying Misleading Light—Mersey River Rules, Art. 4—Infringement by Possibility contributing to Collision—Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

By art. 4 of the rules as to lights to be carried by vessels in the river Mersey —contained in the schedule to the Order in Council of May 17, 1890, and made in pursuance of s. 32 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63)—a vessel, having two or more masts, when at anchor in that river, shall carry two white lights, of the prescribed size and power, one on the forestay, at a height not exceeding twenty feet above the hull, and the other near the stern at double the height of the bow light.

By s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), a vessel infringing any of the regulations contained in, or made under, the Merchant Shipping Acts, is, in case of collision, to be deemed in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

The *T.*, a steamship under way in the Mersey, came into collision with another vessel whilst carrying—in addition to the ordinary coloured side lights,

white stern light, and white masthead light—another white light on the mizen truck alleged to be a Customs' signal light.

No regulation or practice to carry such last-mentioned light was proved, and, it being doubtful on the evidence whether the two white lights of the *T.* which were first seen, viz. that at the masthead and that at the mizen truck, might not have misled those in charge of the other vessel into thinking that these lights indicated that the *T.* was a vessel at anchor:—

Held, that the *T.* must be deemed in fault under s. 17 of the Merchant Shipping Act, 1873.

ACTION of damage by collision. The plaintiffs were the owners of the steamship *Stanley Force*, the defendants were the owners of the steamship *Talbot*.

The facts—so far as bearing on the question of an alleged misleading light carried by the defendants' vessel—were as follows:—

On December 19, 1890, in hazy weather, about 4.15 A.M., the *Stanley Force*, of 136 tons net register, 60 horse-power nominal, a crew of ten hands all told, and carrying the regulation lights for a steamer under way, was proceeding down the river Mersey, on a N.¼ E. course, at a speed of about six knots an hour, against the last of the flood which was running about one knot.

She was close in shore on the Liverpool side, when those in charge of her observed, off the Salisbury Dock entrance, about half-a-mile distant, and one and a-half to two points on the port bow, two bright lights, which it was alleged they took to be those of a vessel at anchor. (1)

The *Stanley Force* was kept on her course until a green light was seen, only 200 yards off, and it was then perceived that the other vessel was under way. The *Stanley Force* stopped, blew her whistle, and subsequently reversing her engines full speed, put her helm hard-a-port; but the bow of the *Stanley Force*

(1) The following are the regulations as to lights to be carried by vessels at anchor in the Mersey:—

Order in Council, May 17, 1890, made in pursuance of s. 32 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63):—

Schedule, rule 4: "Every vessel when at anchor shall carry the white light prescribed by art. 8 of the said regulations" (that is, the Regulations for Preventing Collisions at Sea), "at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow where it may be best seen, and, in addition to the said light, all vessels having two or more masts, shall exhibit another similar white light at double the height of the bow light, at the main or mizen peak, or on the boom topping lift, or other position near the stern where it can be best seen."

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came into collision with the stem of the other vessel, which proved to be the *Talbot*, a steamship of 300 tons net register, engines of 90 horse-power nominal, a crew of fifteen hands all told, with a cargo of sugar from Dunkirk. Those in charge of this vessel had starboarded to go into the Salisbury Dock, and when the vessel was heading about E. with a speed of one-and-a-half knots, they saw, three points on the starboard bow, and at a distance of a quarter of a mile, the masthead and red lights of the *Stanley Force*. Two short blasts of the whistle were thereupon sounded, and the *Talbot* continued on her course; but finding that the *Stanley Force* was attempting to pass ahead, the engines of the *Talbot* were stopped, then reversed full speed, and three short blasts sounded on her steam whistle before the collision occurred, by which both vessels were considerably damaged.

The *Talbot* was at the time carrying—in addition to the ordinary coloured side lights, white stern light, and white masthead light (the latter about twenty-seven feet from the deck)—a globular lantern at the mizen truck, about fifty-seven feet above the deck, shewing a white light which was alleged to be a Customs' signal light, and, according to the statement of defence, was "required by law to be carried in the Mersey by ships coming from a foreign port."

Sir Walter Phillimore and *Joseph Walton*, for the plaintiffs. It was the duty of the *Talbot* to have kept out of the way of the *Stanley Force*, as she had the latter vessel on her starboard side; and her neglect to do so arose from bad look-out. Secondly, the globe light carried by the *Talbot* at the mizen truck was misleading, as, taken together with the masthead light, they resembled the anchor lights required by the Mersey Rules, and the light actually used was an anchor light.

No evidence has been produced to support the allegation in the defence, as the only law requiring a light at all analogous to this is s. 8 of 6 Geo. 4, c. 78 (1), under which a vessel coming

(1) 6 Geo. 4, c. 78, s. 8: "Every . . . master . . . having the charge of any vessel liable to the performance of quarantine shall . . . hoist . . . in the night time . . . a large signal lanthorn with a light therein, at the (maintop) masthead. . . ."

from a quarantine port is required to exhibit a white light at the main topmasthead. This light was, however, not exhibited there, and it is admitted that Dunkirk was not, at the time, a quarantine port, and that the *Talbot* had no sickness on board. No other lights than those required by the regulations can be carried: *The Imbro* (1); and no justification for a departure from the regulations relating to lights has been shewn, for nothing approaching a practice has been proved to carry a Customs' light in this way for the purpose of being boarded by an officer of the Customs. The *Talbot* must, therefore, be deemed in fault under the Merchant Shipping Act, 1873.

Barnes, Q.C., and *J. P. Aspinall*, for the defendants. The green light of the *Talbot* ought to have been sooner seen by the *Stanley Force*, in which case the latter vessel could have eased and gone under the stern of the *Talbot*. Secondly, the mizen truck light is a usual signal for the Customs, and, as it was necessary for the master of the *Talbot* to signal for the Customs' boat, the necessity for a departure from the regulations as to lights has been shewn. Assuming that no sufficient practice has been proved in respect of the Customs' light, still those in charge of the *Stanley Force* could not have been misled, as the light might have been the quarantine light, which is required by law, and which is frequently carried by vessels coming up the Mersey.

SIR CHARLES BUTT, President. [After referring to the facts above set out, the learned judge found the *Stanley Force* to blame for not having a good look-out, and going too fast in the then state of the weather. He also found that the *Talbot* had not a good look-out, and continued:—]

Those on board the *Stanley Force* say that the mizen truck globe light carried by the *Talbot* misled them into thinking that that vessel was a ship at anchor. By the Mersey Rules a vessel at anchor is to have a bow light twenty feet above the hull, and a light near the stern double that height. The mizen truck light of the *Talbot* was about double the height of the forward light, and the two might have seemed to be anchor lights. Was the *Stanley Force* misled? This is doubtful on the evidence,

(1) 14 P. D. 73.

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as the Elder Brethren think that (apart from the green light which ought to have been seen sooner) the *Stanley Force* might have seen, that the *Talbot* was coming across the river.

If, however, the *Stanley Force* might have been misled, and if it was wrong for the *Talbot* to carry the light, then the latter vessel is to be held to blame under s. 17 of the Merchant Shipping Act for a breach of the regulations as to lights, unless circumstances rendered the breach necessary. (1) It is to be observed that only such vessels as come from a quarantine port can carry a quarantine light; and because some vessels which come into the Mersey are required to carry a light at the main topmast head, other vessels carrying a second light on a mast are not to be absolved.

It was contended that a custom exists to carry the mizen truck light; but no general usage has been proved, nor any law pointed out requiring this light. The Elder Brethren also think that the *Talbot* might have waited until she was going into dock before hoisting the light. Therefore, though I am not satisfied that the *Stanley Force* was really misled by the light, still, as it was not necessary for the *Talbot* to depart from the regulations, and as, on the evidence, it is doubtful whether the *Stanley Force* might not have been misled, I must hold, under s. 17 of the statute, that the *Talbot* is also to blame.

Solicitors for plaintiffs: *Hill, Dickinson, Dickinson, & Hill, Liverpool.*

Solicitors for defendants: *H. W. Collins, Robinson & Co., Liverpool.*

(1) The Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17: "If, in any case of collision, it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

T. L. M.

[IN THE COURT OF APPEAL.]

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Divorce—Wife's Petition—Husband's Cruelty and Adultery—Legal Cruelty—Undefended Suit—Question argued by Queen's Proctor—Delay in Presentation of Petition—Divorce and Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Divorce Court Amendment Act,* 1860 (23 & 24 *Vict. c.* 144), *s.* 5.

In August, 1890, a wife presented a petition for a divorce upon the ground of adultery coupled with cruelty. The marriage had taken place in December, 1858; the only child of the marriage—a son—was born in 1866, and the parties separated by agreement in 1870. A separation deed was then executed by them, which contained the usual covenant by the husband that he would not molest the wife; and they had lived apart ever since. The wife never took any proceedings before the petition; the cruelty charged took place between 1861 and 1870, and the adultery charged was in 1889. No act of personal violence was alleged; and the cruelty charged against the husband was his conduct in living for many years with successive mistresses, and telling his wife of his infidelities and of his preference of other women to her. The suit was undefended; and the witnesses gave evidence that the wife's health was delicate, and that the husband's conduct had to his knowledge impaired it. The only explanation given by the petitioner of her delay in taking proceedings was in effect that she did not wish to proceed until her son had grown up and she could ascertain his wishes:—

Held, by Butt, J., that the husband's conduct did not amount to legal cruelty, and that the wife was not entitled to a divorce.

On appeal,

Held, by the Court (Lindley, Lopes, and Kay, L.JJ.), that, even assuming legal cruelty to have been proved against the husband, the wife's delay of twenty years in taking proceedings had not been sufficiently explained, and was so unreasonable that the Court, in exercise of its discretion under the Divorce and Matrimonial Causes Act, 1857, s. 31, ought to refuse to decree dissolution of the marriage

The judgment of Butt, J., affirmed.

THIS was a petition presented by the wife on August 1, 1890, praying for the dissolution of the marriage on the ground of her husband's adultery, coupled with cruelty. The respondent had filed no answer, and did not appear.

The parties were married on December 1, 1858, and had been living apart under a deed of separation since 1870, and the cruelty charged occurred previous to the separation; but the adultery relied on was in December, 1889.

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The separation deed contained the usual covenant by the husband against molestation, and gave the custody of the only child of the marriage, a son, who was born in 1866, to the wife.

The case was heard before Butt, J., without a jury, when the learned judge found for the petitioner on the issue of adultery, but, not being satisfied that the acts and conduct proved against the respondent amounted to legal cruelty, adjourned the hearing under s. 5 of the Matrimonial Causes Act of 1860, and directed the papers should be sent to the Queen's Proctor in order that the question might be argued by counsel.

From the evidence given at the hearing, it appeared that at the date of the marriage the respondent was twenty-three years of age, and the petitioner seventeen. They lived happily together until July, 1862, when they went to Ems, where the husband frequented the society of a woman who went by the name of Miss Walters, of whom he had become enamoured. He went off with her to London, and ultimately wrote to his wife telling her he had eloped with Miss Walters, and recommending her to take proceedings to relieve herself of her union with him. He travelled with Miss Walters in Italy and in America for some months; but in 1863 he left her and returned to this country alone, when by the good offices of friends he became reconciled with his wife, and she resumed cohabitation. In 1865, while they were living at the respondent's seat in county Down, there was a scandal in the neighbourhood respecting the relations between him and a young girl who was teacher in a school. She was found to be enceinte, and the respondent told his wife he was afraid she would father her child on him, as he had been improperly intimate with her.

He repeatedly spoke to his wife of his immoral relations with other women, and was in the habit of telling her that he liked them better than her. On one occasion, when he lost his watch, he told her it had been taken by a woman with whom he had passed the night. At Geneva he flirted with a young lady, and told his wife that he used to go down to a boathouse to watch her bathe. He also told her of an occurrence at a country house where he said a lady had come into his room naked and remained all night with him, and at another country house in which they

were both staying he paid compromising attentions to another young lady, and a letter was written proposing an elopement. In 1869 he made the acquaintance in Paris of a woman whose Christian name only—"Esther"—was known to petitioner, and who lived with him for several years as his mistress. The petitioner saw them together in the Bois de Boulogne, she wearing a dress which the petitioner had declined as being too expensive for her. When she died he inserted her name in the obituary column of the *Times* as "Esther Beauclerk," and he wrote to his wife that he had "lost the only living creature who ever loved me." The next year he took another mistress, Kate Tucker, with whom he was alleged to be living at the time of the presentation of the petition.

On several occasions the husband was guilty of acts of improper familiarity with female servants in his wife's presence. No act of actual violence was charged, but Mrs. Beauclerk's health was delicate all through the married life, and she stated that her husband's repeated infidelities and his conduct to her generally had caused her much anguish of mind, which had acted on her bodily health.

In 1870 the parties separated under the above-mentioned deed, by which an annuity of 1000*l.* a year, secured to Mrs. Beauclerk on the reconciliation in 1863, was continued to her, and they had lived apart ever since. No proceedings were ever taken by the wife against the husband until the presentation of the petition, and the only explanation of the delay in presenting the petition given by the petitioner was this. In answer to a question put to her in her examination as to why she delayed taking steps, she said: "I have long wished to take steps, but there has always been great difficulty. I did not wish to in the early times. I hoped he would repent, and latterly as the child was growing up I wanted to wait until my son got older to see if he would wish it." And it appeared from the evidence that the petitioner's son attained the age of twenty-one years in May, 1887. The Countess of Rosslyn, the sister of petitioner, in her deposition, stated that she had warned the respondent of the serious effects on his wife's health of his conduct towards her, and that he had frequently told her he did not care for his wife, and there

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was similar evidence given by other members of the family. Medical witnesses were called, the first of whom, Dr. Thetford, spoke to Mrs. Beauclerk's condition after the receipt of the letter announcing her husband's elopement, when she suffered from great nervous exhaustion, long fainting fits, and weak, irritable heart. She suffered in a similar way when she learned of her husband's intrigue with the schoolmistress. He also stated that he had told the respondent that the mental worry and excitement caused by his infidelities might be fatal to his wife's health. Dr. Dobree Chepmell, who attended the petitioner in Paris when the respondent was living openly with his mistress "Esther," stated that she was then suffering from palpitation, depression, and a tendency to syncope, and he said that ten years after when he attended her again he found her much worse. Her heart had weakened to an irremediable degree, and she presented all the appearances of a person who had led a very unhappy life. Both medical witnesses were of opinion that the husband's habit of telling his wife of his infidelities aggravated her disease.

Dr. Bowles, of Folkestone, gave evidence to the same effect.

Sir Charles Russell, Q.C. (*Inderwick, Q.C.*, and *Temple Franks*, with him), for the petitioner. The first legal proposition to be established in relation to the present case is this—that when a wife has at any time suffered conduct at the hands of her husband which would amount to legal cruelty, and subsequent evidence comes before her sufficient to establish the fact of adultery, she is entitled to a divorce on proof of such facts, without being called upon to shew that there is any probability of a continuance of the cruelty. In other words, if during the married life a state of things has existed which gives the wife the right to a judicial separation, and if subsequently on that state of things adultery supervenes, the Court is entitled to take the two together, and to grant relief.

[BUTT, J. I do not think I need trouble you further on that point.]

The question, then, resolves itself into this: was such a state of things proved to have existed at any time during the married

life of these persons as would have entitled the wife to apply for a judicial separation? The facts in this case undoubtedly constituted a case of legal cruelty; and if it were not so—if no relief could be granted—the law would present a most anomalous aspect, and the case would emphasize strongly the different manner in which the law deals with men and women in these matters. [He commented on the evidence, laying special stress on the fact that the husband had openly flaunted his numerous infidelities in his wife's face, that he had continued them through a long series of years, and that he had systematically neglected his wife.]

[BUTT, J. Suppose a man were to take a mistress, and live with her, perhaps not exactly opposite to his wife, but in the neighbourhood, would that be cruelty?]

It might be going further than the cases warrant to hold that such conduct amounted to cruelty; but it would take very little more to make marital relations impossible. The whole story in this case revealed a long course of continued profligacy studiously obtruded on the wife's notice, which, acting on a woman of delicate constitution and keen susceptibilities, had seriously injured her health, and rendered the marriage tie a galling and intolerable burden, from which the Court, acting on the principles of legal cruelty laid down in the cases, was entitled to relieve her. [He cited *Kelly* v. *Kelly* (1), *Mytton* v. *Mytton* (2), and *Bethune* v. *Bethune*. (3)]

Sir E. Clarke, Q.C., S.G. (*B. Deane*, with him) for the Queen's Proctor. No case has been made out to justify the Court in entertaining the claim for a divorce. It would be dangerous to alter and extend the definition of legal cruelty as hitherto laid down in this Court to such an extent as to hold the petitioner entitled to a divorce. It would be doing that which the legislature alone has a right to do, granting a divorce to the wife on the ground of adultery alone. It is altogether new that because a woman is so morally susceptible and physically weak as to be injured in her health by the fact that her husband informs her that he has committed adultery, she is therefore

(1) Law Rep. 2 P. & D. 31-59. (2) 11 P. D. 141.
(3) See post, p. 205.

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entitled to a divorce. The evidence merely comes to this, that there was immoral conduct on the part of the husband, and on several occasions he informed his wife of it. There is nothing in the shape of irritating language — no violence. *Bethune* v. *Bethune* (1) is no authority, for no final decree has yet been pronounced.

[BUTT, J. I cannot shut my eyes to the fact that in that case the husband did not oppose, and the question was not argued.]

In *Mytton* v. *Mytton* (2) there was evidence of real bodily fear on the part of the wife. In *Kelly* v. *Kelly* (3) the Judge Ordinary laid it down that the conduct of the husband must be systematic; but there is no evidence here to shew that the cohabitation of husband and wife would be dangerous. The doctors say that the wife's health was affected; but some of them do not say that it was because of the husband informing her of his adultery, and none of them knew the lady before her marriage. In all the cases the Court has seen that there has been an intention on the part of the husband to injure his wife's health; but there is no such evidence here. [He cited *Paterson* v. *Paterson.* (4)] It is unheard of to ask for a decree on the ground of cruelty which occurred twenty years ago, and when the parties have been living apart under a separation deed for the whole of that period.

Inderwick, Q.C., in reply. The evidence shewed that the petitioner did actually suffer in her health from the knowledge of her husband's adultery, and the husband was warned both by her sister and by the doctor that her health would suffer. If the husband, knowing this fact and regardless of it, pursues a course of conduct which he has been warned may injure his wife, he must be held responsible for the consequences. That is the rule of law as to intention as laid down in Stephen's Digest of the Criminal Law, 3rd Ed. p. 144. The injurious consequences to the wife's health have been progressive from the time of the separation, and she is still suffering from them. As to the delay the case of *Newman* v. *Newman* (5) shews that the Court

(1) See post, p. 205.
(2) 11 P. D. 141.
(3) Law Rep. 2 P. & D. 31-59.
(4) 3 H. L. C. 309.
(5) Law Rep. 2 P. & D. 57.

has discretion to grant a decree even where it may appear to have been excessive.

BUTT, J. In this case the petitioner claims a divorce from her husband on the ground of his adultery and cruelty. The adultery relied on is comparatively recent, and I have already expressed my opinion that the charge has been established The series of acts relied on as constituting cruelty occurred as much as twenty years ago; for during the last twenty years the husband and wife have been living separate. On the last occasion I expressed an opinion that the evidence given did not sustain a charge of cruelty. I did not attempt then, and I do not attempt now, to give any exhaustive definition of the word "cruelty" as the law regards it. It would be hopeless and useless to attempt to do so; but I had a strong view to this effect, that the acts and conduct proved against the husband in this case are not such as would entitle the wife to a finding in her favour on this point consistently with the authorities. I think I should be going far beyond any of the decided cases if I held that the conduct imputed to him amounted to cruelty. That having been my view on the former occasion, it has not been altered by the arguments I have heard to-day. As to protecting the wife against future danger to life or health, that does not arise, because the parties have been living separate for twenty years, and there has been no molestation by the husband during that period. On the whole, I feel constrained to refuse to grant a divorce; but I am prepared to pronounce a decree of judicial separation on the ground of adultery.

Inderwick, Q.C., intimated that the petitioner would prefer to have the petition dismissed.

BUTT, J. Then I dismiss the petition.

W. L.

The petitioner appealed.

Sir Charles Russell, Q.C., Inderwick, Q.C., and *Temple Franks*, for the petitioner. The learned judge has refused to grant a divorce, upon the ground that the husband's conduct did not

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amount to legal cruelty. In this case the cruelty occurred many years since, but the adultery of 1889 has revived it. It is a fallacy to suppose that cruelty necessarily means physical violence. The question this Court has to consider is, Has there been such a course of conduct on the part of the husband as to make the marriage relations unbearable to the wife, and physically to affect her health? If so, that amounts to legal cruelty. That there has been such a course of conduct on the part of the husband in this case—conduct persisted in with knowledge of what the effect on his wife would be—is clearly established by the evidence. The authorities shew that it is not necessary to prove acts of physical violence to establish cruelty in respect of which this Court will give relief to the wife: *Kelly* v. *Kelly* (1); *Bethune* v. *Bethune* (2); *Mytton* v. *Mytton* (3); *Lockwood* v. *Lockwood* (4); *Popkin* v. *Popkin* (5); *Paterson* v. *Paterson* (6); *Birch* v. *Birch* (7); *Holden* v. *Holden* (8); *Power* v. *Power* (9); *Smith* v. *Smith* (10); *Knight* v. *Knight.* (11) In considering what is cruelty, the Court must take into consideration the social station of the parties and the condition of the sufferer: *Westmeath* v. *Westmeath.* (12) It is sufficient if there is an intention to injure the wife's life or health—an intention shewn by the husband's knowledge of the probable result of his conduct: *Brown* v. *Brown* (13); Stephen's Digest of Criminal Law, 3rd ed. p. 144.

[LOPES, L.J., referred to *Dysart* v. *Dysart.* (14)

LINDLEY, L.J. Here the charge of cruelty has not been urged for more than eighteen years; it is necessary, therefore, to look into the case very closely.]

The question of delay has not been raised in this case by any one. Subject to the intervention of the Queen's Proctor, where circumstances require it, a divorce action proceeds in the same way as any other action, and the Court is not bound to take

(1) Law Rep. 2 P. & D. 31.
(2) See post, p. 205.
(3) 11 P. D. 141.
(4) 2 Curt. 281.
(5) 1 Hagg. Eccl. Ca. 765, 768.
(6) 3 H. L. C. 308.
(7) 42 L. J. (P. & M.) 23.
(8) 1 Hagg. Consist. Rep. 453.
(9) 34 L. J. (P. M. & A.) 137.
(10) 2 Phillim. Eccl. Rep. 207.
(11) 34 L. J. (P. M. & A.) 112.
(12) 2 Hagg. Eccl. Ca., Supplmt., pp. 1, 72.
(13) 1 P. & D. 46, 50.
(14) 1 Rob. Ecc. 106, 120.

notice of a question which neither the husband nor the wife has raised.

[KAY, L.J. But is it not the duty of the Court itself to regard the question of delay?]

There are no circumstances here requiring the Court to go into a question not raised by the parties. But it has been long established that in divorce actions mere time is no bar in the case of the wife, as various reasons may induce her to forbear coming to the Court for relief: *Popkin* v. *Popkin* (1); *Newman* v. *Newman* (2); *D'Aguilar* v. *D'Aguilar*. (3) In *Newman* v. *Newman* (2) the delay was much longer than in the present case. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31, does not say that in all cases where "unreasonable delay" has occurred the Court shall not grant a divorce, but only that the Court "shall not be bound" to do so: *Newman* v. *Newman*. (2)

[KAY, L.J. The section clearly makes the power of the Court discretionary if there has been unreasonable delay.]

It is not the practice to plead "unreasonable delay," but only to give dates. Here there has been no delay which is not rationally accounted for; and, therefore, the wife is not debarred on that ground from the relief she asks.

The adultery in 1889 revived the previous cruelty: *Palmer* v. *Palmer* (4); *D'Aguilar* v. *D'Aguilar*. (5) As to the suggestion of the learned judge below, that there was no reason for the interference of the Court because the husband was not likely to molest the wife in future, that was not a proper ground for refusing relief. The separation deed is no bar to the wife's right. If she was entitled in 1870 to a decree having the effect of a divorce a mensâ et thoro on the ground of cruelty, she is, in consequence of her husband's adultery in 1889, now entitled to a decree for divorce a vinculo. Her legal position now is just the same as if this case had been argued in 1870, subject only to the question of delay, as to which there is no true ground for the refusal of the Court to interfere.

Sir E. Clarke, Q.C., S.G., B. Deane, and *Priestley,* for the

(1) 1 Hagg. Eccl. Ca. 765.
(2) 2 P. & D. 57.
(3) 1 Hagg. Eccl. Ca. 773, 780.
(4) 2 Sw. & Tr. 61.
(5) 1 Hagg. Eccl. Ca. 773, 781.

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Queen's Proctor. Neglect is not legal cruelty; and there is no case except *Kelly* v. *Kelly* (1) in which a judicial separation has been granted on the ground of cruelty without some act of personal violence. *Bethune* v. *Bethune* (2) was not really contested; but even there there was an act of violence. Here the petition does not itself contain such allegations of acts of legal cruelty as, coupled with adultery, would be a ground for divorce. For when cruelty is coupled with adultery as the ground of divorce, the cruelty must be such as, if the charge of adultery failed, would in itself entitle the wife to relief. The principle on which relief is granted is the protection of the wife; and in this case the parties have lived apart for more than twenty years under a deed of separation containing a covenant by the husband not to molest the wife, and there is not the slightest suggestion that he has ever attempted to molest her or her child. The circumstances of this case shew that the petition has been presented for some collateral purpose; and the Court will infer from the delay (unless it is fully and satisfactorily explained) either an insincerity in the complaint, acquiescence in the injury, or a condonation of it: *Mortimer* v. *Mortimer* (3); *Pellew* v. *Pellew* (4); *Matthews* v. *Matthews.* (5) It must be borne in mind that this is an undefended suit; and, consequently, none of the witnesses were cross-examined, and many leading questions were put to them. Where cruelty of this character is alleged—i.e., cruelty not involving any physical violence, or any apprehension of injury—what the Court looks to is the intention of the husband; and if the acts of the husband are done without the intention of being cruel, or without the belief that such acts are cruel, they do not constitute legal cruelty; and such acts do not become cruel until the doer knows that they produce pain, and insists on repeating them for the purpose of giving pain: *Birch* v. *Birch* (6); *Brown* v. *Brown.* (7)

[KAY, L.J. Where a man with ingenuity makes his wife's life a burden to her without causing her bodily pain or apprehension of violence, would not the Court interfere?]

(1) Law Rep. 2 P. & D. 31.
(2) See post, p. 205.
(3) 2 Hagg. Consis. 310, 313.
(4) 1 Sw. & Tr. 553.
(5) 1 Sw. & Tr. 499.
(6) 42 L. J. (P. & M.) 23.
(7) Law Rep. 1 P. & D. 46, 50.

Where perverse ingenuity addresses itself to produce such a result, the Court would, no doubt, interfere to protect the wife.

But in this case the delay alone is fatal to the petitioner. The Court has under the 31st section of the Divorce and Matrimonial Causes Act, 1857, a discretionary power to refuse to pronounce a decree when the petitioner has been guilty of unreasonable delay in taking proceedings, even although the case of the petitioner has been proved. Here there has been a delay of twenty years, and the excuse put forward is utterly inadequate.

W. T. Raymond, watched the case on behalf of the husband.

Inderwick, Q.C., in reply.

LINDLEY, L.J. This appeal is from a decision of Butt, J., refusing to grant the wife relief in the shape of a divorce, and the case is one in which the dates are of some importance. The material dates are these: The marriage took place in 1858, at which time the wife was between seventeen and eighteen years of age. In 1866, the only child of the marriage—a boy—was born. He attained the age of twenty-one in May, 1887. In 1870, the husband and wife separated by agreement, a deed of separation was executed, and they have lived apart ever since. On August 1, 1890, twenty years after their separation, this petition for a divorce was presented by the wife upon the ground of the recent adultery of the husband, and of the cruelty of which we have heard so much. Now, Butt, J., saw that this was an undefended case, he saw that none of the witnesses had been cross-examined, and he was of course aware of the nature of the questions put, and to what extent they were leading; and having regard to all these circumstances, he came to the conclusion which he expressed in the short judgment which he delivered. That conclusion was that cruelty on the part of the husband had not been so clearly established as to bring the case within the authorities with which that branch of the Court is so familiar. It has been contended before us that he was wrong, that there is evidence of such cruelty as would have entitled the wife to a decree if she had presented her petition in 1870 or

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1871; and we are asked to say that her delay in taking proceedings has been satisfactorily accounted for.

I do not propose to criticise the evidence with reference to the case of cruelty, and it is not necessary for me to say whether or not a case of cruelty has been made out within the meaning of s. 27 of the Divorce and Matrimonial Causes Act, 1857, which empowers a wife to present a petition for dissolution of marriage upon the ground (inter alia) of adultery coupled with such cruelty as without adultery would have entitled the wife to a divorce a mensâ et thoro. Whether that is made out depends upon the effect of the evidence, having regard to the extent to which it ought to be discounted by reason that in an undefended case there is no cross-examination of the witnesses, and that leading questions are often put. I will assume that, making due allowance for all proper discount upon those grounds, the result of the case is a little on the side of the wife—that is to say, I will assume that there has been such misconduct on the part of the husband as to have injured his wife's health to his knowledge; and I will assume that, notwithstanding that knowledge, he continued such misconduct. If that was the true result of the evidence, I think it would follow that a case of cruelty had been made out. I do not say that is the true result. I will assume it.

Now, assuming that, we must look at another section of the Act, viz. s. 31, which is important. Read shortly, the section is, so far as now material, as follows: "In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved . . . . the Court shall not be bound to pronounce such decree"—that is, a decree declaring the marriage to be dissolved—"if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting the petition." In the present case there has been a delay of twenty years. That is primâ facie a delay which is utterly unreasonable, not even on the border line. And what is the explanation? All we have upon the point is that in answer to a question of counsel, asking the petitioner why she had delayed taking steps, she said: "I have long wished to take steps, but there has always been great difficulty. I did not wish to in the

early times. I hoped he would repent; and latterly, as the child was growing up, I wanted to wait until my son got older, to see if he would wish it."

Can that be said to be a satisfactory reason for not taking these steps sooner? Having regard to the fact that there was only one child of the marriage, and that a boy, I cannot accept it as such. It appears to me, that if we were to allow such a reason as that as an excuse for delay, then there is no case in which delay would not be excusable. The Court might just as well strike the sections out of the statute. Then it comes to this, that the case is not one in which the Court is bound to grant the petitioner the relief which she seeks; and, speaking for myself, judicially, I think it is a case in which we certainly ought not to do so. It would not be right. If a lady who has a case for a decree lies by for twenty years without any excuse whatever, and then brings forward her petition, the inevitable inference to any man of the world, however charitable he may be, is that there is some reason in the background for presenting the petition other than the bonâ fide desire to be protected from her husband. It appears to me that we should be doing wrong if, in the face of such a delay, so excused, we were to pronounce a decree in this case. I am therefore of opinion that the appeal ought to be dismissed with costs.

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LOPES, L.J. In this case the wife seeks to obtain a dissolution of her marriage from her husband on the ground that during the marriage he has committed adultery, and has also been guilty of cruelty towards her. The wife is bound to establish both these propositions in order to obtain the relief which she is asking.

A difficult and important question is raised in this case with regard to legal cruelty; or rather, I should say, whether what has been proved in this case amounts to legal cruelty. The suit is an undefended suit, and it is correct to say that the witnesses have not been cross-examined, and that many leading questions have been put in examination which in all probability would not have been put in that form if the suit had been defended. It is therefore not unfair that the evidence should be discounted to

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a certain extent. I do not desire to express any opinion whether the facts and the evidence given raise a case of legal cruelty or not. I am not at all prepared to say that they do not, if the evidence is to be believed and is not to be discounted to a very great extent. But I would rather leave a question of this kind, if it ever arises again, open for decision, without committing myself to an opinion with regard to it.

Putting aside, then, the question of cruelty, another question arises under s. 31 of the Act of 1853. The effect of that section is that it is in the discretion of the Court to refuse relief by way of dissolution in a case where there has been unreasonable delay on the part of the petitioner. The question is, whether, having regard to the facts of this case, there has been unreasonable delay.

Now it cannot, I think, be denied that in 1870 the wife was in a position to have obtained a dissolution if she could have proved her case to the satisfaction of a jury. She did not take any such step; but on the contrary, in that year she separated from her husband upon the terms of a separation deed which contained the usual provision against molestation by the husband, and she did not commence this suit for dissolution until 1890.

She gave evidence of adultery in 1889 which would have revived the antecedent cruelty. But twenty years had elapsed from the time when she might have brought her suit for dissolution. If there were nothing further in the case it would, I think, be impossible to say that there had not been unreasonable delay. A delay which at first sight is unreasonable may be explained, and the petitioner in this case might have been in a position to give such an explanation as would have satisfied the Court that the delay was not unreasonable. But the explanation which she has given simply amounts to this—that she hoped her husband would repent, that she was influenced by the fact that her son, a boy, was growing up, and would attain his majority in 1887, and that she wished to wait until her son had grown up. It is difficult to see how that could have influenced her in any way. If her child had been a girl, there might have been more to have been said for it; but I cannot see why the growing up of a boy

should have been any ground for waiting the whole of that period and delaying a remedy to which she was entitled in 1870. At any rate, the explanation appears to me to be inadequate. It is in the discretion of the Court to grant relief where there has been unreasonable delay. I think in this case the Court properly exercised its discretion by refusing to grant it. Having regard to the lapse of time, it is difficult to come to any other conclusion than this: that the wife brings her suit now, either for some collateral reason which we do not know, or because she was insensible to the wrongs she had sustained at the hands of her husband. I think, therefore, the appeal must be dismissed.

KAY, L.J. I entirely agree that the delay in this case, which has been fully twenty years, is unreasonable. It follows, therefore, that it is within the discretion of the Court whether it will now destroy the vinculum of marriage or not. Now what are generally the effects of delay in litigant proceedings? The effects are these. It very much impairs the memory of those who have to give a testimony as to what has passed; and again, witnesses who might have been living at the time when the facts to be proved occurred may have died in the interim. We have to test this case to see whether, in the exercise of the discretionary jurisdiction of the Court, we ought now to grant the relief asked, having regard to those amongst other considerations, and the proper test is to treat the suit as if it were that which it is not really, a defended suit. Suppose the husband had defended the suit, he might, for anything that we know, very well have said that there were witnesses who could have rebutted a great deal of the evidence urged against him, who are either dead or gone away, or are no longer accessible. Might he not also have said that all evidence given against him was by people whose memory had been impaired by a lapse of twenty years since the event had happened? It seems to me that he might well have said all this. Now the judge before whom this case was tried had the advantage, which we have not, of hearing what the witnesses actually did say, and some comments have been made upon the evidence which has been read to us which it seems to me are quite justified. He has decided that it is not a case in which he ought

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to exercise his discretionary jurisdiction by making a decree for the dissolution of the marriage. When a judge of experience has, after hearing the witnesses, dealt in that way with a jurisdiction which is clearly discretionary, it would, as it seems to me, be a very strong thing for a Court of Appeal to interfere with his decision.

Moreover, this is not a case in which any protection for the wife is in the least degree wanted. A separation took place in 1870. A separation deed was then executed, which I understand was in the usual form, with a provision against molestation of the wife by the husband. The only child of the marriage was then committed to her custody, and during its infancy it remained in her custody. There is not a suggestion that the husband has ever attempted in any way to molest her, or has in the least degree interfered with the custody of the child. There has been no evidence or suggestion that this petition was presented for any purpose of protection to herself or to the child, or that any such purpose would be answered by the granting of the application. It is certainly the duty of all Courts to discourage a litigation of this kind brought after such long and unexplained delay; for I agree with the other Lords Justices that no explanation has been given to which we can pay any attention at all. I therefore entirely agree with the other members of the Court that, in the exercise of the discretion which the Court undoubtedly had, Butt, J., came to the right conclusion in saying that the petition ought to be refused.

Appeal dismissed.

Solicitors: *Lewis & Lewis; The Queen's Proctor, C. T. Dalton.*

W. W. K.

BETHUNE *v.* BETHUNE.

1890
June 21.

Divorce—Cruelty.

In an undefended suit by the wife for divorce on the ground of adultery coupled with cruelty, the facts relied on at the hearing to establish the charge of cruelty consisted of a long course of systematic neglect and insult. The husband refused to allow his wife to occupy the same room with him or to go out with him. He was frequently absent, and refused to give any account of his absences. He told her he hated her presence, frequently used violent language, and threatened to leave her if she did not do as he wished. Her health rapidly failed during her married life, and in the opinion of her medical attendants her husband's conduct and the mental distress and anxiety caused by her marital relations generally, accounted fully for the serious condition in which they found her:—

Held, on the authority of *Kelly* v. *Kelly* (Law Rep. 2 P. & D. 31–59), that this conduct on the part of the husband constituted legal cruelty, and a decree nisi granted.

PETITION by the wife for dissolution of the marriage on the ground of adultery coupled with cruelty.

The respondent in his answer admitted the adultery, but denied that he had been guilty of cruelty.

The case was heard before the President without a jury.

Sir C. Russell, Q.C., and *Inderwick, Q.C.* (*Middleton*, with them), for the petitioner.

Bayford, Q.C., for the respondent.

From the evidence given at the hearing of the case by the petitioner and her mother, it appeared that the parties were married in February, 1886, the petitioner being twenty-eight years of age and the respondent thirty-six. After the marriage they resided at various places, and at every place the respondent, on the plea of ill-health which prevented him sleeping unless he were alone, refused to allow his wife to share his bed, and ordered a separate room for her. He frequently told her that he loathed being in the same room with her, that he hated her presence, and that it made his life a hell to him. In the summer of 1886 they went to Scotland, and there the respondent left his wife for nearly a fortnight. He refused to take her with him; and when she went to his room at night to speak about it, he

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gave her a violent push to prevent her coming into his room; which threw her to the ground. This was the only act of actual physical violence charged against him. He habitually neglected his wife and refused to take her out with him; and when he had absented himself from her and she asked him where he had been and what he had been doing, he refused to tell her. He frequently used violent language, and threatened to go away and leave her unless she did exactly as he wished. He often received letters in ladies' handwriting, and refused to give any account of them. In reply to her remonstrances he said he could never be different; and she must lead her own life.

The petitioner was fond of her husband, and did all she could to gain his affection; but his continued neglect made her very ill; she was continually crying, got very thin, and could not eat nor sleep. In the autumn of 1888 respondent intimated to his wife that he was going to Ems. She begged to be taken with him; but he refused, and went alone, as it was thought at the time; but it subsequently was discovered that he had taken somebody with him. On a subsequent occasion he told his wife he was going on a sea voyage, and agreed to take her with him on condition that a separate cabin was taken for her and that she did not sit next to him at table, and did not expect him to speak to her. He said he would not look after her, and they must be as strangers. Finally, he went away without her. The petitioner fell ill and was taken to her mother, and during his absence it was discovered that he had been keeping a mistress during the whole of the married life. The petitioner had an independent income of over 3000*l.* a year, which on the death of her mother would be increased by 4000*l.* or 5000*l.*; while the respondent had an estate in Scotland which was heavily mortgaged. His wife at the marriage settled 1000*l.* a year on him after her death, had paid his debts to the amount of about 5000*l.*, and had spent 16,000*l.* in freeing his Scotch estate from the incumbrances on it and in purchasing the equity of redemption.

Dr. Quain, who had known the petitioner from her childhood, stated that he saw her a few weeks after her marriage, and noticed that she was much depressed and feeble and weak. In 1887 and 1888 he saw her on various occasions, and noticed that her health

was rapidly failing. In 1888 he came to the conclusion that if the trouble from which she was suffering continued she would not live. He was of opinion that the husband's conduct as she had described it had injured her health.

Dr. Broadbent stated, that on being consulted in 1887 he found the petitioner suffering from excitement, depression and great derangement of the digestive organs. She complained of sleeplessness and loss of appetite. Her condition was clearly produced by mental distress and anxiety. He saw her again in October, 1888, and found the same depression, sleeplessness, and indigestion as before, and she had become so thin that he feared she had been attacked by consumption. In his opinion, her marital relations would account for her condition, and he believed they had caused the injury to her health.

Sir C. Russell referred to *Kelly* v. *Kelly* (1) and *Mytton* v. *Mytton.* (2)

Bayford, Q.C., for the respondent, did not cross-examine the witnesses nor address the Court.

THE PRESIDENT. It is not necessary for me to say more than that I think the medical evidence, taken in conjunction with the evidence given by the petitioner, brings the case within *Kelly* v. *Kelly* (1); and as the adultery is proved, I therefore pronounce a decree nisi on the ground of adultery and cruelty, with costs against the respondent.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitor for respondent: *W. H. Herbert.*

(1) Law Rep. 2 P. & D. 31, 59. (2) 11 P. D. 141.

W. L.

1891
March 24.

[IN THE COURT OF APPEAL.]

MICHELL *v.* MICHELL.

Restitution of Conjugal Rights—Refusal of Wife to comply with the Decree—Settlement of Wife's Separate Estate for Benefit of Husband—Restraint on Anticipation—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.

A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, application was made under s. 3 of the Matrimonial Causes Act, 1884, for a settlement of her property for the benefit of the husband, when it appeared that the whole of the wife's property had been settled on the occasion of her marriage to her separate use without power of anticipation:—

Held, reversing the decision of Jeune, J., that the Court had no power to order a settlement of the property which was subject to the restraint on alienation.

Swift v. *Swift* (15 P. D. 118; [1891] P. 129) explained.

APPEAL from an order of Jeune, J., made on an application for a settlement of the wife's separate property for the benefit of the husband, who had obtained a decree for restitution of conjugal rights, which she had refused to obey. (1)

Prior to the marriage a settlement had been executed, the funds comprised in which were wholly the property of the wife, being a portion of the estate of her first husband. By the settlement the income derived from the fund was to be paid to the wife for her life for her separate use without power of anticipation, and after her death the capital was to be held, as to one portion, upon trust for the children of her first marriage, and as to the remainder upon trust for the children of the marriage of the petitioner and the respondent as therein mentioned, and in default of such children upon trust for the benefit of the children of the first marriage.

The registrar, to whom the petition for maintenance was referred, reported that the income of the wife was 540*l.*, and of the husband 80*l.*, being the amount of a pension to which he was entitled.

When the motion was heard before Jeune, J., the wife, who was respondent, objected that the Court had no jurisdiction to

(1) Ante, p. 166.

deal with property of a married woman which was settled upon her for her separate use without power of anticipation. His Lordship, however, overruled the objection, and directed a settlement to be made under which a portion of the respondent's income was to be paid to her husband. The wife appealed from this decision.

Inderwick, Q.C., Bankes, and *Lewis Thomas,* for the wife. The course of legislation makes it clear that it was not intended to give power to the Court to interfere with the provisions of existing marriage settlements except where the marital tie was entirely dissolved. The Act of 1857 (20 & 21 Vict. c. 85), s. 45, gave no such power, as was decided in *Norris* v. *Norris.* (1) The Act of 1859 (22 & 23 Vict. c. 61), s. 5, gave such power only in case of nullity of marriage and dissolution of marriage. The Act of 1884 (47 & 48 Vict. c. 68), s. 3, which applies only to cases where the marital tie still remains, follows the language of the Act of 1857, and it would be contrary to all principles of construction to import into it the powers of the Act of 1859. *Swift* v. *Swift* (2) is not inconsistent with this view, because the final order did not necessarily interfere with such part of the income as was bound by the restraint on anticipation. The Court of Chancery has always refused to allow an order for sequestration or for costs to be issued so as to affect a woman's separate estate, if it is subject to restraint on anticipation: *In re Glanvill* (3); *In re Andrews* (4); *In re Keane* (5); *Hyde* v. *Hyde.* (6)

Bayford, Q.C., and *Vesey Fitzgerald,* for the husband. *Swift* v. *Swift* (2) entirely governs this case. There is no suggestion in the judgment of Lord Hannen on the appeal that the order was confined to property not subject to the restraint on anticipation. The Court made such an order as now asked for in *Seatle* v. *Seatle.* (7) If the interpretation contended for by the appellant should prevail it would make the enactment in the Act of 1884 a dead letter. The Act was passed to avoid the scandal of imprisoning the wife and to give the husband another remedy;

(1) 1 S. & T. 174; 27 L. J. (P. & M.) 72.
(2) 15 P. D. 118; [1891] P. 129.
(3) 31 Ch. D. 532.
(4) 30 Ch. D. 159.
(5) Law Rep. 12 Eq. 115.
(6) 13 P. D. 166.
(7) 30 L. J. (N.S.) (P. & M.) 216.

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and if the wife can shelter herself under her restraint of anticipation, it leaves the husband powerless. It is no objection to a writ of sequestration that it is in general terms so as to include property settled with a restraint on alienation: *Hyde* v. *Hyde*. (1)

LINDLEY, L J In this case the appeal must be allowed. The question is an important one, in consequence of the frequency of clauses against anticipation inserted in marriage settlements. The history of the legislation on the subject makes it to my mind impossible to uphold the decision of Jeune, J.

There are three Acts of Parliament which we have to consider. The first is the Act of 1857 (20 & 21 Vict. c. 85), which applies not only to divorces but to judicial separations in which the wife continues to be a wife, and the language of the 45th section is that, "if it shall be made to appear to the Court that the wife is entitled to any property in possession or reversion, it shall be lawful for the Court if it shall think proper to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party or of the children of the marriage or either or any of them."

Now, that section was judicially considered in *Norris* v. *Norris* (2); and, as I understand the decision in *Norris* v. *Norris* (2), it was this: that the Court could not alter an existing marriage settlement, and could not deprive a wife of the protection enjoyed by her under a clause restraining her from anticipation. It is quite obvious that you do alter the settlement if you strike out that clause, or if you override it, or do anything whatever which frees the married woman from the fetter which is imposed by that clause of the Act of Parliament. This being the interpretation put upon the language of the section, and the power of the Court being fettered, and, as the legislature thought, unduly fettered, the power of the Court was enlarged in 1859 by the 22 & 23 Vict. c. 61, and enlarged by terms which it is agreed on all hands enables the Court in cases falling within the 5th section of that Act to override clauses against anticipation. But observe that that enlarged power is only given where the wife ceases to be a wife, namely, after a final decree of nullity of

(1) 13 P. D. 166. (2) 1 S. & T. 174; 27 L. J. (N.S.) (P. & M.) 72.

marriage or dissolution of marriage, and where, therefore, according to the ordinary doctrines of the Court of Chancery, she would be free from the restraint against anticipating her income.

Now we come to the third Act, the 47 & 48 Vict. c. 68, which is the one we have to deal with. This Act applies where there has been an order for restitution of conjugal rights—that is to say, where the wife does not cease to be a wife, but on the contrary remains as much a wife as ever; and in that case it is very curious to observe that the legislature has adopted, not the wider language of the Act of 1859, but the narrow language of the Act of 1857.

We cannot consistently with the ordinary principles which guide us in interpreting Acts of Parliament hold that this Act does more than was done under the first Act. We cannot say that, having regard to the history of this legislation, the Court has power to vary the settlement in this sense—namely, to strike out of it that clause which restrains the wife from anticipation, or to make her make a settlement which is inconsistent with the continued existence of that clause.

When we come to look at the authorities they will be found subject to what I shall say as to *Swift* v. *Swift* (1), to be perfectly consistent with that view; *Seatle* v. *Seatle* (2), is certainly not inconsistent with it, because in *Seatle* v. *Seatle* (2) I cannot find that there was any clause against anticipation, and it is quite obvious to my mind, when a married lady has a life income which she can do what she likes with and can assign or encumber, the Court has power to make her resettle that, and make her do what it wishes. *Seatle* v. *Seatle* (2) is, therefore, out of the way; it does not throw any light on the question. *Swift* v. *Swift* (1) does, and I cannot understand *Swift* v. *Swift* (1) except in one way. I think when Butt, J., made the first order, he was under the impression, as his language expresses, that if the wife had the income it did not much matter whether it was under a fetter or was not; but when we pursue that case to see what was done, we find that finally nothing was done which was inconsistent with the view which I now take, because in *Swift* v. *Swift* (1) the wife had two incomes: she had an income of 300*l.* a year which

(1) 15 P. D. 118; [1891] P. 129. (2) 30 L. J. (P. & M.) 216.

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she was free to do with what she liked during her life; she had also an income of 500*l.* a year as to which she was restrained from anticipation. The final order was that she should make a settlement of something under 300*l.* a year—an order which could be complied with consistently with the existence of the clause restraining her from anticipation. So that when we come to look at *Swift* v. *Swift* (1), from first to last, we do not find that any order was there made which was inconsistent with the view which I have been compelled to take of this Act of Parliament. It does not appear that Jeune, J., was acquainted with the final order in *Swift* v. *Swift*. (1) His observations are based upon the judgment of Butt, J., in the early part of that litigation—the subsequent order throws a great deal of light upon it.

I can, therefore, find no case which is really inconsistent with the view I am expressing; but, on the other hand, there are cases which are consistent with that view, and which I do not think are consistent with any other view. I mean the decisions in the sequestration case of *Hyde* v. *Hyde* (2), and in *In re Glanvill* (3), which go the whole length of saying that the Court had no power, except indeed under the Conveyancing Act, which does not apply here, to do anything to deprive the wife of the protection which is thrown around her by clauses of this description. The appeal, therefore, must be allowed.

BOWEN, L.J. I am of the same opinion, and shall only add a few words. We must recollect that after 20 & 21 Vict. c. 85, had been passed, which contained a section in pari materiâ and in very similar language with this, the case of *Norris* v. *Norris* (4) was decided, by which the Court refused to alter the marriage settlement, and said that language like that gave the Court no power to alter it; and further, that by 22 & 23 Vict. c. 61, power was given to the Court expressly to do that in a limited class of cases only where nullity or dissolution of marriage had been decreed. When, therefore, we find the third Act of Parliament, 47 & 48 Vict. c. 68, going back to the language of the first Act,

(1) 15 P. D. 118; [1891] P. 129.
(2) 13 P. D. 166.
(3) 31 Ch. D. 532.
(4) 1 S. & T. 174; 27 L. J. (N.S.) (P. & M.) 72.

when dealing with a class of cases, which are not cases of nullity or dissolution of marriage, but where the marital tie still exists, it would be doing violence to all the rules of construction to suppose that we ought to place upon the language of the last Act any other construction than that which was placed upon it by the Court in *Norris* v. *Norris*. (1)

That such was in fact the construction placed by *Norris* v. *Norris* (1) upon the first Act seems plain when we refer to the case, and especially to the light which was shed upon it by the note in the report, which cites *Tourle* v. *Tourle*, a case decided before Lord Campbell in the Appeal Court on May 13, 1858, in which Lord Campbell again says: "The point has been considered, and the Court are of opinion they have no power to alter marriage settlements." Well, that is the way in which the law stands, if it stood upon the Act of Parliament alone. But I think, besides that, there is every reason for supposing that the Act of Parliament may have been designedly intended to do something short of enabling the separate property of a woman, where there was a fetter upon anticipation, to be brought within the purview of that section. It is contrary to the principles of this Court, and of any Court of this kingdom which deals with a woman's property (unless the statute has expressly given them power), that a woman should be enabled by her own conduct to discharge herself from the fetter imposed by restraint upon anticipation of her income. That has been pointed out in case after case, as for example in *In re Glanvill* (2), and in the Court of Appeal in *Hyde* v. *Hyde* (3), where we refused to allow a sequestration to issue although a married woman was in contempt.

As to the other authorities which have been cited, *Seatle* v. *Seatle* (4), and *Swift* v. *Swift* (5), very clear observations have been made upon them by my learned brother, and I say nothing more.

KAY, L.J. It seems to me that the legislation in matrimonial cases is not only perfectly consistent in all the three Acts which

(1) 1 S. & T. 174; 27 L. J. (N.S.) (P. & M.) 72.
(2) 31 Ch. D. 532.
(3) 13 P. D. 166.
(4) 30 L. J. (P. & M.) 216.
(5) 15 P. D. 118; [1891] P. 129.

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have been cited, but is very reasonable, and evidently very carefully and cautiously considered.

The first Act applied either to a case of dissolution of marriage or to a case of judicial separation, and in either case it gave power to the Court to make a settlement for the benefit of the husband and children, where the wife was in fault, of property of the wife. But it did not refer in any way to marriage settlements or to altering marriage settlements. Then came the case of *Norris* v. *Norris* (1), where the language of the judges is very shortly reported, but which was a case in which, having decreed dissolution of marriage, Lord Campbell, then presiding in the Matrimonial Court, after consideration, declared that, "as regards marriage settlements, we think we have no power to deal with them in any way." We have not got the facts of that case before us very completely; but it is obvious from the language that what the Court was asked to do was in some way to interfere with the marriage settlement. Therefore, I shall come to the conclusion that it was a case in which the wife under the marriage settlement was restrained from anticipation, and the Court was asked, notwithstanding that restraint, to deal with the interest which she had under the marriage settlement. That very probably is so. But whether that was so or not there came the second Act of 1859, which did not apply to a case where the vinculum of matrimony remained, but where it was broken, and it provided, where there was an absolute dissolution of marriage, the Court in that case, and in that case only, might deal with the marriage settlement, and alter it for the benefit of the former husband and children.

Then came the third enactment, which does not deal at all with the case of dissolution of marriage, but deals with a case where there has been an order for restitution of conjugal rights, or where there is an application for restitution of conjugal rights by the husband, and there the Court is empowered, not to interfere with the marriage settlement, but, adopting the language of the first Act, it is empowered to make a settlement out of the property of the wife.

Therefore, as I have said, it seems to me that the legislature

(1) 1 S. & T. 174; 27 L. J. (N.S.) (P. & M.) 72.

has very carefully limited the power of interfering with the marriage settlement to the sole case where a dissolution of marriage has been decreed. Accordingly, in this particular case, there having been no dissolution of marriage, but it being a case of decree for restitution of conjugal rights, the Court has no power whatever to interfere with the marriage settlement.

I have no doubt, from the language of Jeune, J., that he felt the difficulty, and only thought he was bound by the decision of *Swift* v. *Swift* (1); but whether the original language of the present President meant that he had power to interfere with the marriage settlement or not, it is clear that the final order made in that case and made by the then President, the present Lord Hannen, was one which did not or need not interfere in any way with the marriage settlement, because the only amount directed to be settled might have been supplied out of funds to which the wife was entitled, and in respect of which there was no restraint upon anticipation at all. Lord Hannen determined that all the Court would do under this last Act, the Act of 1884, was to direct a settlement to be made, and he directed a settlement to be made of so much of the wife's income. Now, that settlement could perfectly have been made without in the least degree interfering with the income as to which the married woman was restrained from anticipation. Therefore, I think it is impossible to treat *Swift* v. *Swift* (1) as being a decision that the Court under this Act of 1884 had any power to alter a marriage settlement by settling that part of the wife's property as to which she is restrained from anticipation. If it did so decide, I confess from my view of this Act of Parliament I should be entirely unable to agree with it.

Appeal allowed.

Solicitors for appellant: *Ingram, Harrison, & Ingram.*
Solicitors for respondent: *Day & Cather.*

M. W.

(1) 15 P. D. 118; [1891] P. 129.

1891
Feb. 27.

TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD. THE ZETA.

Admiralty—Damage to Ship—Negligence of Dock Official—The County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*The County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4—*Costs.*

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, "Any county court having admiralty jurisdiction shall have jurisdiction to try the following causes . . . (3) as to any claim for damage . . . by collision . . . in which the amount claimed does not exceed three hundred pounds."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4, "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

The plaintiffs brought an action in personam, in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, against a dock company for injuries to the amount of 221*l.* 4*s.* 6*d.* to their steamship by a collision with the dock wall, occasioned by the negligence of the servants of the dock company. The Court found the dock company liable, and on the application of the defendants to disallow the costs of the action:—

Held, that the plaintiffs must be refused the costs of the action as it fell within the words of s. 4 of the County Courts Admiralty Jurisdiction Act, 1869, and therefore might have been brought in a county court exercising Admiralty jurisdiction.

ACTION IN PERSONAM by the plaintiff, on behalf of himself and others, the owners of the screw steamer *Zeta*, against the Mersey Docks and Harbour Board, for negligence, causing injury to their steamship by collision with the wall of the pierhead on the east side of the entrance to the Nelson Dock, Liverpool.

The vessel was at the time proceeding from the Stanley Dock into the Sandon Graving Docks under the orders of the dock officials in the employment of the defendants, and two of the four blades of her propeller were broken by striking against the wall whilst the machinery was in motion.

The Court, on the advice of the Trinity Brethren, found that owing to the strong westerly wind blowing at the time the ship got out of position, and, on the ground that this would have been prevented if the defendants' servants had not negligently

omitted to require a bow rope to be made fast to the entrance of the next dock before the vessel left the entrance to the Nelson Dock, the Court gave judgment in favour of the plaintiffs. The writ in the action claimed damages without specifying any amount; but the particulars furnished to the defendants put the damages (including 60*l.* demurrage) at 221*l.* 4*s.* 6*d.*

On the question of costs:—

The defendants applied to the Court to disallow the plaintiffs the costs of the action on the ground that under s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, as amended by s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (1), the action might have been brought in a county court exercising Admiralty jurisdiction.

Barnes, Q.C., and *Joseph Walton*, for the plaintiffs, contended that the action was properly brought in the High Court, as the amount claimed, and that which would be recovered, were greatly in excess of the limit for a common law action for negligence in a county court, and an action in personam in respect of a collision with a dock wall was not within the meaning of the statutes conferring Admiralty jurisdiction on county courts: *Everard* v. *Kendall* (2); *Flower* v. *Bradley* (3); nor within the meaning of the words "damage received by any ship" in the statutes conferring jurisdiction on the Court of Admiralty itself: *The Robert Pow.* (4) In any case costs were in the discretion of the Court: *Tenant* v. *Ellis.* (5)

Carver, and *A. Hyslop Maxwell*, for the defendants, relied on the words of s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, "all claims for damage to ships whether

(1) The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3: "Any county court having admiralty jurisdiction shall have jurisdiction to try the following causes . . . (3.) as to any claim for damage . . . by collision . . . in which the amount claimed does not exceed three hundred pounds."

The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise when the amount claimed does not exceed 300*l.*"

(2) Law Rep. 5 C. P. 428.

(3) 44 L. J. (Ex.) 1.

(4) Br. and L. 99.

(5) 6 Q. B. D. 46.

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by collision or otherwise when the amount claimed does not exceed three hundred pounds." The expense to the defendants has been very much increased by the action not being tried, as it might have been, in Liverpool, where all the defendants' witnesses reside. The case of *The Asia* (1) is much stronger than this, as there the amount claimed exceeded the statutory limit of 300*l.*; but as the amount recovered was less, the Court held that the plaintiffs were not entitled to any costs.

SIR CHARLES BUTT, President. The cases cited on behalf of the plaintiffs do not appear to me to have any application, as the words of the statute are clear, and I think the combined effect of s. 3 of the Act of 1868, and s. 4 of the Act of 1869, is to give the county court jurisdiction. The action might therefore have been brought in the county court exercising Admiralty jurisdiction in Liverpool, where the cause of action arose. All the defendants' witnesses reside in Liverpool, and expense would have been avoided if the action had been tried there. No difficult question of law was involved, and the county court would have been a very efficient tribunal for the questions of fact which had to be tried. The damages will be referred to the registrar in the usual way unless the parties previously agree as to the amount. I refuse the plaintiffs the costs of the action.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., agents for A. T. Squarey, Liverpool.*

(1) [1891] P. 121.

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March 3, 25.

Admiralty—Practice—Examination of Witness before Examiner—Correction of Transcript of Shorthand Notes—Application to take Transcript off File—Further Return—Costs.

If, after filing in the Admiralty Registry the transcript of the shorthand notes of the evidence of a witness taken before an examiner, a mistake is discovered to have been made by the shorthand writer in transcribing his notes, application should be made by the party grieved to the Court for an order directing that the transcript be taken off the file and returned to the examiner for amendment, and the costs thereby incurred will be costs in the cause.

MOTION by plaintiffs, owners of the steamship *Drumhendry*, in an action of damage by collision, for an order to direct that the transcript of the evidence of a witness on behalf of the defendants (the owners of the *Knutsford*), examined before one of the examiners of the Court, should be taken off the file and returned to the examiner for amendment so as to make it correspond to the evidence given by the witness.

In pursuance of an order dated February 12, 1891, the defendants produced four of their witnesses for examination before one of the examiners appointed to the Admiralty Division. The defendants' solicitors had, previously to the examination, requested the examiner to obtain the services of a shorthand writer, and, with their approval, one was engaged to attend and take a shorthand note of the evidence of the witnesses.

On the completion of the examination, the transcript of the shorthand notes of the evidence was furnished to the examiner by the shorthand writer, and this transcript was, in the usual way, without the perusal of the examiner, transmitted by him to the Admiralty Registry for filing, together with the following certificate of the shorthand writer, and return, dated February 18, of the examiner:—

"I, Thomas Sanders, shorthand writer, certify that I attended and took notes of the examination of [four witnesses named], and that the foregoing is an accurate transcript of the same."

"I, Richard Stephens Jackson, examiner, hereby certify as follows:—

"On the 14th day of February, 1891, previously to the

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examination of the witnesses herein for the defendants, it was agreed between the counsel for the plaintiffs and the counsel for the defendants that the evidence should be taken by a shorthand writer, and that the reading over and signing by the witnesses of their depositions should be dispensed with. I then having by consent of the said parties first duly sworn Thomas Sanders, shorthand writer, faithfully and correctly to take down and transcribe the evidence to be given before me in the action, I, in the presence of the aforesaid counsel, administered the usual oath of a witness to, and caused to be examined, the following witnesses who were produced before me on behalf of the defendants to give evidence in this action, namely [names of four witnesses]."

According to the affidavits, of the examiner and of the clerk to the solicitors of the plaintiffs, filed in support of the motion, it appeared that the solicitors of the plaintiffs subsequently called the attention of the examiner to the fact that the evidence of Robert Williams, a witness, as contained in the transcript filed in the registry, and printed by the defendants' solicitors, did not contain a statement made by that witness upon cross-examination by the plaintiffs' counsel, and omitted a portion of the re-examination by the defendants' counsel. The examiner thereupon sent for the shorthand writer and for the original notes of the evidence, and in the presence of the solicitors for the plaintiffs and the defendants requested the shorthand writer to read from the notes. The examiner then found that the transcript of the notes was both incorrect and incomplete.

Butler Aspinall, for the plaintiffs. The mode adopted for the examination of the witness, whose evidence is now in question, is in accordance with the established Admiralty practice existing before the Rules of the Supreme Court, 1883. As it is a convenient and expeditious mode of having the evidence taken down, it has continued to be the practice, and the transcript is admitted to prove the oral evidence of the witness; but after the transcript of the shorthand writer's notes has been certified by the shorthand writer as correct, and returned by the examiner into the registry, there would seem to be no means of getting it

off the file in order to correct it without an application to the Court.

F. W. Raikes, for the defendants. Directly it was ascertained that there were errors in transcribing the shorthand notes, the defendants consented to the transcript being taken off the file and handed back to the examiner for correction. The present motion is, therefore, unnecessary, and the defendants ought not to be subjected to any costs in the matter.

SIR CHARLES BUTT, President, directed that the transcript of the evidence of Robert Williams, one of the defendants' witnesses examined pursuant to the Order of Court made in this action on February 14, be taken off the file, and returned to the examiner before whom the said evidence was taken, for amendment, so as to make it correspond with the evidence given by the said witness, the costs of the motion being reserved.

In accordance with this order, the transcript of the shorthand notes of the evidence of the witness in question was amended, and again transmitted by the examiner to the Admiralty Registry for filing with the following further return, dated March 10:—

"I, Richard Stephens Jackson, examiner, hereby certify as follows:—

"That, in pusuance of the order of the President of the above division, dated the 3rd day of March, 1891, the transcript of the shorthand writer's notes of the evidence given before me in this action on the 14th February, 1891, and filed by me in the registry of the said division on the 18th February, 1891, was returned to me by the solicitors for the plaintiffs herein for amendment, as in the said order directed. I accordingly requested Thomas Sanders, the shorthand writer, to so amend the transcript of the evidence of the witness Robert Williams, taken before me on the said 14th day of February, 1891, as to make it correspond with the evidence given by the said witness upon such last mentioned date; and the said Thomas Sanders, on the 7th day of March, 1891, in my presence, made such amendments in the said transcript of the evidence of the said Robert Williams as appear therein in red ink."

The evidence contained in the amended transcript was then

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printed by the plaintiffs' solicitors, with the amendments in red ink, for use at the hearing.

March 25. The action was tried by Jeune, J., with assessors, and resulted in the defendants' vessel, the *Knutsford*, being found alone to blame for the collision. The decree accordingly pronounced in favour of the plaintiffs, with costs.

J. P. Aspinall, for the plaintiffs, applied for the costs attending the amendment of the transcript of the shorthand writer's notes of the evidence of the witness Robert Williams.

F. W. Raikes, for the defendants. The mistake was not in any way the fault of the defendants, nor did it affect them, but they afforded every facility to the plaintiffs to have it set right, and the costs ought, therefore, not to be thrown upon them.

JEUNE, J. A mistake having been made, without the fault of either the plaintiffs or the defendants, it became necessary to apply to the Court to take the transcript off the file and amend it. The costs so incurred are properly costs in the cause, and as such must be borne by the unsuccessful party—that is, in this case, by the defendants.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Pritchard & Sons.*

T. L. M.

THE KONG MAGNUS.

1890 *May* 14; *July* 15, 22. 1891 *March* 10.

Admiralty—Collision—Delay in instituting Action in rem—Maritime Lien —Change of Interest—Statutes of Limitation—Practice—Interest on Damages.

In 1878 a collisio occurred, in the North Sea, between a Norwegian steamer and a British vessel, in which the latter was sunk. The name and place of business of the Norwegian company owning the steamer were known to the owners of the British vessel, and for one or more days, on forty-seven occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During the same period there were changes in the capital and in the shareholders of the Norwegian company.

In 1889 the plaintiffs, the owners of the British vessel, instituted an action in rem against the Norwegian steamer. The owners of the Norwegian steamer, as defendants, pleaded, in bar of the action, that the claim of the plaintiffs, their rights (if any), and their maritime lien (if acquired), had been lost by laches, and that it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, and the greater part of the crew of the steamer were not now available to give evidence:—

Held, that the plaintiffs were entitled to prosecute their claim for damages, for in each case the particular circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, and the change of property, and in this case, though the defendants would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, the defendants had failed to shew that the merits could not be gone into.

The action was subsequently compromised on the terms that the defendants should pay to the plaintiffs one half of the damages proceeded for. In assessing such damages the registrar awarded interest on the amount at 4 per cent. from the time the British vessel would probably have reached her destination (May 1, 1878) until payment.

On objection to the registrar's report, on the ground that no interest was due at all on an amount which had not been ascertained until the institution of the action, or that no interest was due under the circumstances of this case, as no claim had been made for eleven years, or that the interest should be limited to six years by analogy to the Statute of Limitations:—

Held, that the interest was properly awarded for the whole period, according to the practice in Admiralty.

PETITION by defendants in objection to the registrar's report, in an action of damage by collision, allowing interest at 4 per cent. from the year 1878, on the sum assessed as damages due to

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the plaintiffs for the loss, in that year, of their brigantine *Mizpah* by collision with the defendants' steamer *Kong Magnus*.

The facts which gave rise to the action, and the proceedings in the action which resulted in the question as to the allowance of interest, were shortly as follows:—

On April 19, 1878, a collision occurred, during a fog, off the Zwart Bank, in the North Sea, between the brigantine *Mizpah*—of 142 tons register and six hands, belonging to some of the plaintiffs, and on a voyage from Portmadoc to Copenhagen with a cargo of slate—and the defendants' screw steamer *Kong Magnus*, in consequence of which the *Mizpah* sank.

On January 8, 1889, an action of damage by collision was instituted by the owners, master, and crew of the *Mizpah* against the *Kong Magnus*, in which the owners of the latter vessel put in a defence, the material paragraphs of which were:—

"3. The *Kong Magnus* is a steamship of 418 tons, belonging to the port of Christiania, and at the time of the collision in question the said steamship was and still is owned by Det Sondenfjelds-Norske Dampskibsselskab, which is a company incorporated under the Norwegian law, carrying on business at Christiania, in the kingdom of Norway. The *Mizpah* was a British ship, and the plaintiffs, the owners of the *Mizpah*, carry on business at Portmadoc, in the county of Carnarvon.

"4. The collision in respect of which this action is brought took place . . . whilst the *Kong Magnus* was bound on a voyage from Christiania to Havre with a general cargo. The master and crew of the *Mizpah* were taken on board the *Kong Magnus* after the collision, and were landed from the said ship at Havre, on April 21, 1878.

"5. The *Kong Magnus* discharged her cargo at Havre, and from the said month of April, 1878, up to the date of the issue of the writ in this action, the said ship has been running on short voyages, and during the last nine years she has repeatedly loaded and discharged cargoes at various ports in the United Kingdom, within the jurisdiction of this honourable Court.

"6. The plaintiffs have always known the name and place of business of the owners of the *Kong Magnus*, and have always had knowledge and notice of the movements and voyages of the said ship, and since the said April 21, 1878, the plaintiffs have been

in a position to prosecute their rights (if any) against the defendants in respect of the said collision, and to pursue their remedy in respect of the same, either against the owners of the *Kong Magnus* or against the ship in rem by process of this honourable Court, or of other Courts of competent jurisdiction, yet the plaintiffs, until the institution of this action, have neglected to do so, and have wilfully stood by and made no claim, and given no notice to the defendants of their intention to make any claim against the said ship in respect thereof, or at all.

"7. By reason of the laches and neglect and delay of the plaintiffs as aforesaid, the defendants have been induced to believe that no claim would be made against them by the plaintiffs for the said collision, and in consequence thereof the defendants are not now in the position to obtain and produce proper and sufficient evidence to establish their defence to this action, which but for such laches, delay, and neglect as aforesaid, they would have been in a position to obtain and produce, and to have established, and witnesses who would have been and were available for the *Kong Magnus* are dispersed, and have been lost sight of by the defendants, and are possibly dead, and the defendants cannot get their evidence, and are further and otherwise hampered and prejudiced in their defence.

"8. Since the date of the said collision, important changes of interest in the ownership of the *Kong Magnus* have taken place, and the rights of third parties have intervened.

"9. By reason of the premises it is unjust and inequitable that the plaintiffs should be allowed to continue this action, and that the defendants should be put to trial upon the facts; and the defendants submit that the plaintiffs' claim is barred, and that their rights (if any) against the defendants are forfeited.

"10. In the alternative, by reason of the premises, the maritime lien of the plaintiffs (if acquired at all) has been lost, and is no longer available.

"11. Until the defences raised in paragraphs 9 and 10 are adjudicated upon the defendants' claim to reserve their right to set out the particulars of the collision."

1890. May 14. Under an order of the Court, made by consent of the parties, witnesses were examined before the President

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(Sir James Hannen) in respect of the preliminary questions of fact raised by the defendants in their defence, and the learned judge having ruled that it was for the defendants to begin, the effect of their evidence was that in 1881 there had been changes in the number of shares and in the capital of the company, and, since the date of the collision, considerable changes in the shareholders, to whom dividends had been paid in ignorance that any claim would be made by the owners of the *Mizpah*. It further appeared that between December 21, 1880, when the *Kong Magnus* was for some days in the Tyne, and August 14, 1889, when she was arrested at Blythe, the vessel had been forty-seven times for short periods amounting in all to 176 days, in ports of the United Kingdom, and that the name and address of the defendants were, from the outset, known to the plaintiffs; but, though, on the arrival of the *Kong Magnus* at Havre, after the collision, protests were there noted and extended about both vessels, and notice of protest was, in accordance with French law, served upon the master of the *Kong Magnus* by the master of the *Mizpah*, no claim was made upon the defendants, and only the master, one officer, three of the crew, and an engineer of the *Kong Magnus* were now available as witnesses out of some twenty-four hands. The log-book was lost.

The effect of the plaintiffs' evidence was that, in view of the opinion of a French advocate as to the difficulty of proceedings in the French Courts owing to both ships being foreigners, and the unfavourable opinion of Norwegian advocates, obtained by the cargo owners of the *Mizpah*, on the merits, no steps were taken, either in France or Norway, against the *Kong Magnus* whilst she was running between Christiania and Havre, nor did the plaintiffs attempt to arrest the vessel in Scotland, when she was trading to Bo'ness. The nature of their efforts to detain her in an English port is sufficiently detailed in the judgment of Sir James Hannen, given below.

July 15. The questions of law raised by paragraphs 9 and 10 of the defence were argued by—

Cohen, Q.C., and *F. Laing*, for the defendants. A maritime lien is not indelible, but may be lost by negligence or delay

where the rights of third parties are compromised: *The Bold Buccleugh* (1). Evidence taken after a lapse of time can be very little depended upon for the detail of circumstances of a collision: *The Juliana.* (2) A presumption arises against the party guilty of laches when the proof is not sufficiently clear to enable the Court to arrive at a satisfactory decision: *The Mellona.* (3) A Court of Admiralty will not enforce stale demands: see cases cited in Parsons' Law of Shipping, vol. ii. p. 361. A Court of Equity discountenances laches: *Grenfell* v. *Girdlestone* (4), *Pearson* v. *Belchier.* (5) If the Statutes of Limitations (6) do not apply, equity will, by analogy, act upon them, and refuse relief under like circumstances: Story's Equity Jurisprudence, ss. 64*a*, 529; Lewin on Trusts, 7th ed. p. 742; 8th ed. p. 871. *The Rebecca* (7); *Gregory* v. *Hurrill.* (8)

Sir Walter Phillimore, and *F. W. Raikes,* for the plaintiffs. The maritime lien for damage can be enforced at any time when, as here, the facts do not shew laches: *The Charles Amelia* (9); that is, when all has been done which under ordinary circumstances, and with regard to expense and difficulty could be reasonably required: *The Europa* (10). See also the American cases, *The brig Sarah Ann* (11); *Willard* v. *Dorr* (12). Delay alone is no bar if a fair trial will not be prejudiced: *Thomson* v. *Eastwood.* (13) The mere change of property does not exonerate a ship from the liability of being sued: *The Bold Buccleugh.* (14) [The case of *Spackman* v. *Evans* (15) was also referred to.] The plaintiffs are willing, under the circumstances, to allow documents, not strictly admissible, but made shortly after the collision, to be used as evidence by the defendants.

July 22. SIR JAMES HANNEN, President. In the first place, it is admitted that there is no Statute of Limitations applicable

(1) 7 Moo. P. C. C. 267, at p. 285.
(2) Swa. 20.
(3) 3 W. Rob. 7, at p. 10.
(4) 2 Y. & C. 662.
(5) 4 Ves. 627.
(6) 21 Jac. 1, c. 16, s. 3; 4 & 5 Anne, c. 16, s. 19; 19 & 20 Vict. c. 97, s. 12.
(7) 5 Ch. Rob. 102, at p. 104.
(8) 5 B. & C. 341.
(9) Law Rep. 2 A. & E. 330.
(10) Br. & L. 89.
(11) 2 Sumner, 206, 212.
(12) 3 Mason, 91, 161.
(13) 2 App. Cas. 214.
(14) 3 W. Rob. 220, at p. 229.
(15) Law Rep. 3 H. L. 171, 220

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to a case of this kind, for it is argued that I should adopt the analogy of the Statutes of Limitations; and further, that even if I do not adopt the fixed periods mentioned in the Statutes of Limitations, that I should refuse to entertain this suit, on the ground of laches on the part of those prosecuting it.

I do not find, in any of the authorities that have been referred to, that any Court ever has fixed upon any period limited by a Statute of Limitations as applicable to suits of this kind.

There are phrases that have been used by the several judges, but there is no case in which any particular period has ever been fixed upon. But it is said that some reference has been made by learned judges to laches which, in some circumstances or other, would be a bar to the claim. There are no decisions which enable me to fix any particular period, and I come to the conclusion that the principle that should guide my decision is this, that in each case it is necessary to look to the particular circumstances, and see whether it would be inequitable, after the period of time, which of course is to be taken into account, and after the circumstances which may have happened (including amongst those the loss of witnesses, the loss of evidence, and including also the change of property), to entertain a suit of this kind.

Of course, if the vessel never had been in this country, or in the United Kingdom, it has not been contended that there would have been any necessity to go to the Courts of Norway to prosecute the action; and I am of opinion that it cannot be asserted that there was any duty to go to Norway to prosecute the claim.

It has been said that no claim was made, and that at least a claim might have been advanced. But there was no obligation on the part of the owners of the injured vessel to make a claim, because it might be anticipated that that would have the effect of preventing the vessel from coming into this jurisdiction. There is no doubt it was thought and expected that the vessel would be, in some circumstances or other, compelled to come within the jurisdiction of this Court, and the opportunity was waited for to enforce the lien given if she should come here.

Of course, if she had never come here there would have been no ground for contending that there had been any laches. She did, however, come to this country on several occasions.

I do not think it is necessary to consider whether or not her coming into a Scotch port ought to be taken into account, because I think it is clear that there were several opportunities of having her arrested in English ports.

A very great number of occasions on which she came into English ports have been given; but on very many of those occasions it would not have been possible to arrest her, because she had come and gone before information could itself have come to the knowledge of Messrs. Pritchard & Sons, who were engaged in the matter.

But, as I say, there were several opportunities which I think, had other steps been taken, might have been made use of to arrest her. I cannot say that I think something more might not have been done. I think that someone might have been employed in Lloyd's to look through the list of departures and arrivals of vessels, and I should imagine that that could have been done at a very small remuneration. There must be many clerks engaged about the offices of the Shipping Gazette who must have the names of these vessels under their eyes very frequently, and very little extra trouble and a little extra remuneration would have insured, I should have imagined, a more specific knowledge of this vessel than seems to have reached Messrs. Pritchard. But I think the observation which has been made in some of these cases is applicable here. There are very few cases in which, after the event, it is not seen that something more might have been done than has been done. It is quite certain, I am satisfied of that, that there may have been a falling off in the exertions which were made to trace this vessel; that, in the first instance, there was considerable activity on the part of Messrs. Pritchard in their endeavours to find the vessel; but I suppose it is in the ordinary course of things that, after there had been a failure to find the vessel during several years, the means taken were not as active as they had been earlier; but certainly there was nothing to induce anybody to believe, but everything to the contrary, that there was any acquiescence in the immunity of the *Kong Magnus*, or any idea of abandoning the claim upon her.

The result, therefore, in my judgment is this, that there are circumstances which would make it the duty of the Court to

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consider whether or not it has become impossible to do justice in the case by reason of the delay which has occurred.

As I have said, if the vessel had never been here, no such question would have arisen at all; but, the vessel having come here, the question which arises for my consideration is whether I consider it would be inequitable in the existing circumstances that the plaintiffs should be allowed to enforce their claim against this vessel? I come to the conclusion that there are no such circumstances. It has not been shewn that the merits of the case cannot be gone into. Several of the crew are living, and may be forthcoming; and it is to be remembered that the defendants will certainly have the benefit of every presumption which can fairly be made in their favour by reason of the absence of any witness. Certainly, if the case is tried before me, I should approach it greatly influenced by the fact, if fact it should turn out to be, that there are witnesses now who cannot be found or produced, upon whose evidence it would appear probable the case would materially turn. I do not doubt that it would be equally the case if the case should be tried before my colleague.

There is one other point (before I deal with the suggestions which have been made as to the mode of trial), namely, as to the change of ownership. I am clearly of opinion that this is not a change of ownership, and, if I were to endeavour to act upon the suggestion of Mr. Cohen, I really should not know by what principle my decision should be guided. He has given some instances which he thinks shew the injustice that would arise from not allowing change in the ownership of the shares to be taken into account. On the other hand, it would be said that, if that is the clear principle, then, unless the change in the ownership of the shares at the moment the first share is sold after the collision which gives rise to the maritime lien would be applicable, or would have a bearing on the case, it would be impossible to define any time at which it is to be said that the change of ownership of the shares is to be a bar to the right of the injured person suing.

It is right that I should say I do not consider my decision now in any way whatever prejudices the argument which I presume will be addressed to the Court, however constituted, which

may have to determine it—that interest should not be recovered during the whole of the period.

I have only further to allude to the proposals which were made by Sir Walter Phillimore as to the admission of evidence. I do not consider that I have any right to impose conditions. Taking the view I do that the plaintiffs are not debarred by the existing circumstances from pressing their remedy, I have no right to say that they shall submit to some variation of the law of evidence; but, as I have said, every reasonable presumption in favour of the defendants ought to be, and if the case is tried before me will be, made. And it will be expedient on the part of the plaintiffs to make such concessions as were indicated by Sir Walter Phillimore, in order that he may meet by those means any prejudice which he fancies the Court might suffer from if he withheld such facilities. But I do not impose it as a condition. I do not think I have a right to impose the condition that something which would not be admissible in evidence should be admitted; but I do not in the least intend to discourage any arrangement of that kind in order to guard against prejudice.

I therefore think that the case must be allowed to proceed.

(In accordance with this judgment, the minutes of the decree as drawn up "pronounced that the maritime lien of the plaintiffs on the vessel *Kong Magnus* in respect of the damage proceeded for in this action has not been lost, and that they are not barred from prosecuting their claim for damages in this action, and" the defendants were "directed forthwith to deliver their statement of defence on the merits." All questions of costs were reserved.)

1890. Nov. 7. The action was stayed by consent on the terms that the defendants should pay to the plaintiffs one half of the damages proceeded for, and that the amount of the said damages should be referred to the registrar and merchants. The reference was duly held, and on—

1891. Jan. 30. The assistant registrar made his report, whereby he found the value of the brigantine *Mizpah* and of her freight on the voyage, loss of return charter, stores, and

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personal effects of the master and crew, to be 2609*l.* 5*s.* 6*d.*, and, in accordance with the above agreement, he allowed the plaintiffs one half of this amount, viz, 1304*l.* 12*s.* 9*d.*, with interest at 4 per cent. per annum from May 1, 1878, until paid.

Pleadings, by way of petition and answer, were then filed, and the objections to the report argued before the President (Sir Charles Butt) by

March 10. *Cohen, Q.C.*, and *F. Laing*, for the defendants. In the first place the defendants contend that no interest is recoverable by law on these damages, because the principle upon which interest is given must be that the defendants are in default in not paying upon demand, or, in other words, that they are in the position technically known as *in mora*; but the plaintiffs never took any steps to have the principal sum ascertained upon which the interest would run, and until the report of the registrar the amount of the liability of the defendants, upon which the claim for interest is based, was not known. During all the long period which has intervened between the collision and the institution of the present action, no demand has ever been made upon the defendants; so that they have never been in default or *in mora*.

Secondly, if interest is recoverable at all, the defendants contend that the practice, in Admiralty, as to the allowance of interest, is discretionary, and that, in the particular circumstances of this case, it will not be allowed. Dr. Lushington, in *The Amalia* (1), states that "interest was given for this reason, namely, that the loss was not paid at the proper time," that is, "from the time when the loss ought to have been paid for"; but "ought" implies a duty, and there could be no duty in this case to pay that which for nearly twelve years was never claimed, and in respect of which no steps were taken to fix the defendants with any liability; so that the defendants have never failed in the performance of any duty cast upon them which would render them liable for interest. There is no previous case in which the action has not been brought within, at the most, three or four years; but in this case for twelve years the company has been

(1) 5 N. R. 164.

paying dividends in ignorance of the existence of any such debt as this, and it would be inequitable to add interest to the damages now for the first time ascertained to be due. So far from giving notice of this claim, the plaintiffs admit, not only that they gave none, but that they refrained from so doing, because they say it might have prevented the defendants sending the vessel within the jurisdiction.

[SIR CHARLES BUTT, President. If an owner has lost his ship by collision, and he thinks that, by giving notice, the other vessel will not come to this country, there can be nothing wrong in his refraining from giving the notice.]

The result is that evidence is not available which would otherwise be forthcoming, the difficulty of meeting the plaintiffs' case is greatly increased, and the shareholders in the defendant company have changed; so that, admitting that the right of action is not barred, still the right of the plaintiffs to any interest ought to be deemed forfeited.

Thirdly, if allowed, the interest should not be for more than six years by reason of the Statute of Limitations or by analogy to it. In *Thomson* v. *Eastwood* (1), where a legacy was claimed under an express trust after a long period had elapsed, the House of Lords held that as the demand, which might have been made earlier, was not made until after a very long period, a Court of Equity would limit the interest to six years by analogy to the Statute of Limitations.

Sir Walter Phillimore, and *F. W. Raikes*, for the plaintiffs. Sir James Hannen, when giving judgment on the preliminary questions raised by the defence, carefully abstained from fettering the discretion of the tribunal which would ultimately have to consider the question of interest, and the assistant registrar and merchants, before whom that question came, have followed the long-established practice of the Admiralty Court in allowing it. The practice to give interest on damages from the time the claim arises was recently fully recognised in two cases tried together: *The Gertrude* and *The Baron Aberdare* (2), and in both cases the award of interest was affirmed on appeal. (3) The

(1) 2 App. Cas. 214. (2) 12 P. D. 204.
(3) 13 P. D. 105.

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principle involved is restitutio in integrum, and, as in working out that principle in the registry, a lump sum is not awarded as in the case of the verdict of a jury, but the whole of the details are gone into and discount deducted off the accounts, it becomes necessary to allow interest in the case of delay in payment, for the plaintiffs have been deprived of the use of the money found to be due to them from the time of the collision, and would, therefore, suffer a loss if they did not get the interest; whilst for the whole of the intervening period the defendants have had the use and enjoyment of the money, and have been in a position to make profit out of it In 1827, in the case of *The Dundee* (1), Lord Stowell confirmed the registrar's report, awarding interest upon the principal sum on the ground that (page 144) "if without payment of interest the wrongdoer could retain the money due to the sufferer, he might apply it to the purposes of an unjust and persevering litigation," and since that time it has been the regular practice to award interest. In *The Canada* (2), the practice where ship and cargo are totally lost in a collision is stated by Mr. Rothery, the then registrar, to be, to allow interest from the probable termination of the voyage—and that is what has been done in the present case. See also the judgment (page 165) of Wood, V.-C., in *Straker* v. *Hartland.* (3)

As no Statute of Limitations bars the original claim, there is no principle upon which the interest can be cut down to less than the full period; and in the chancery case of *Re Dewell, Edgar* v. *Reynolds* (4), the full amount of interest was awarded for a period of thirty years on the ground that the Crown had had the use of the money of the intestate which rightfully belonged to the plaintiffs as next of kin.

F. Laing, in reply. As to the first and second grounds of objection raised by the defendants to the allowance of interest, the case of *The Baron Aberdare* (5), cited against them does not carry the matter any further, because it was, for the purposes of the argument, there conceded that the practice of allowing interest

(1) 2 Hagg. 137.
(2) Lush. 586.
(3) 5 N. R. 163.
(4) 4 Drew. 269.
(5) 13 P. D. 105.

from the time when the claim arose existed in the Admiralty Court, and the only question was whether the rule at common law or that in Admiralty should be applied. On the third ground of objection the contention is, that though no Statute of Limitations applies in Admiralty, the Court will act as a Court of Equity would do, that is, adopt the rule laid down in *Thomson* v. *Eastwood* (1), and limit the interest to six years.

SIR CHARLES BUTT, President. It seems clear that a different rule exists in collision suits in the Admiralty Division, and existed in the Court to which it has succeeded, to that which prevails in a Common Law Court as to including interest in the damages. A Court of Common Law does not include interest in the damages assessed, because, as I understand it, until a man knows the amount of the principal liability he would have to discharge, he could not know and pay into Court the amount of interest, and, therefore, was not in any default. On the other hand, I presume the view of the Court of Admiralty has been that the person liable in damages, having kept the sum which ought to have been paid to the claimant, and having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable. If the matter were res integra, I might be disposed to think that the more logical and better rule was that followed by a Court of Common Law; but I am not in a position to take that course because a clear and uniform rule has long existed in the Court which this tribunal now represents, and that rule has been, I understand, approved at least in one case by the Court of Appeal. I cannot therefore depart from it, and am bound to hold, somewhat against my inclination, that the plaintiffs are entitled to recover this interest. But then it is said, that even if that be so, there are authorities to the effect that, though there is no Statute of Limitations barring the plaintiffs' right to recover more than six years' interest, still, acting equitably, I ought to refuse to allow interest for more than six years. In support of this contention the case of *Thomson* v. *Eastwood* (1) was in particular cited. I, however, do not think that case does support the con-

(1) 2 App. Cas. 214.

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tention, because under the will there in question a trust was expressly constituted, and it was in consequence of the trust that the operation of the Statute of Limitations was prevented. The property between the time when the claim might have been asserted and the time when it was asserted had passed into other hands, and, under those circumstances, the House of Lords decided to apply, as a Court of Equity would, the principle of the Statute of Limitations, though the statute itself did not touch the case. I do not think that case is analogous to that now before me, nor do I think there is any case which will support the proposition that the interest ought to be restricted to six years. Being reluctantly constrained, therefore, to hold that some interest is due, I think I must also hold that that interest must run practically from the time of the collision. That is the view the assistant registrar seems to have taken. [The learned judge here read the reasons given by the assistant registrar for the allowance of interest. (1)] I decline to interfere with the report, and disallow the objection with costs.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Botterell & Roche.*

(1) The reasons given by Mr. E. S. Roscoe, assistant registrar, were as follows:—

"In regard to the question of interest, I was referred to a passage in the judgment of the late President. It appeared to me that this left the question entirely to the discretion of the registrar. I came to the conclusion that I ought to give interest since the late President had decided that the plaintiffs were entitled to recover damages against the defendants, and I could see no reason why, if they were entitled to any damages at all, they should not be entitled to interest as part of those damages. As I understand the subject, interest has always been given by the registrar and merchants, not as interest on a judgment debt, but as part of the damages to represent the amount of profit arising from the use of the capital sum. The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it; I therefore saw no reason to depart from the constant and long practice of the Court in this case. The merchants agreed in my view of the matter."

T. L. M.

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Feb 24, 25; *March* 3.

Probate—Production of Documents.

The defendants in an action by the plaintiff propounding a will having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, bankers' cash books, and other entries and memoranda relating to the testatrix and her affairs:—

Held, that the papers above mentioned being the private property of the solicitor, the plaintiff could not be compelled to produce them for inspection;

Held, further, that an order could not be made directing the administrator pendente lite to inspect the papers and take copies of them for the defendants.

APPEAL by plaintiff against a registrar's order directing the production of documents, and motion by the defendants to direct the administrator pendente lite to inspect the documents and give copies of them to defendants.

The plaintiff, Mrs. Katherine O'Shea, propounded as sole executrix and universal legatee the last will and testament, bearing date March 7, 1888, of Mrs. Anna Maria Wood, late of Eltham, in the county of Kent, deceased, who died May 19, 1889, and in the alternative she propounded various other testamentary documents of earlier dates.

The defendants, Charles Page Wood and Lieut.-General Sir Evelyn Wood, nephews of the deceased and brothers of the plaintiff, opposed probate on the ground that the will was not duly executed, that the testatrix was of unsound mind at the time of execution, and that it was procured by the undue influence of the plaintiff.

On August 14, 1890, the usual order was made for the discovery of documents, and on July 17 the plaintiff's affidavit was filed. On November 10, 1890, the defendants obtained an order for a further affidavit of documents, and on December 22 1890, the plaintiff filed an affidavit of which the second paragraph was as follows: "That Mr. Horatio Noble Pym, who is my solicitor in this action, has, I believe (because I am so informed by him), diaries, extracts from diaries, cash ledgers, expense ledgers, cash books, disbursement books, and bankers' cash books,

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containing entries and memoranda relating to the deceased and her affairs. Such books the said H. N. Pym informs me and I believe are his private property. I have no control over them, and therefore cannot say what they contain. Such books are not in any way in my possession or power, nor are they in the possession or power of the said H. N. Pym as my solicitor."

On January 15, 1891, the registrar made the following order: "I do order that the plaintiff within seven days from the service of this order do file a further affidavit of the documents referred to in the second paragraph of the further affidavit of documents filed herein December 22, 1890, and that the said plaintiff do produce the said documents to the defendants within fourteen days after the filing of her said affidavit."

In obedience to this order the plaintiff, on February 10, 1891, filed the following affidavit:—

"I refer to the second paragraph of my former affidavit of documents filed herein December 22, 1890, and I say that Mr. Horatio Noble Pym, who is my solicitor in this action, was the solicitor for the deceased Anna Maria Wood for many years before her death, and I am informed by the said Horatio Noble Pym, and I believe that he has in his possession as her solicitor, diaries, extracts from diaries, cash ledgers, expense ledgers, disbursement books, bankers' cash books, containing entries and memoranda relating to the deceased and her affairs, as set out in the following schedule which he has furnished to me. I have no knowledge of the said entries or memoranda except from the information which has been furnished to me by the said Horatio Noble Pym; they are not in my possession, and he claims the books and documents mentioned in the schedule as his private property."

The schedule referred to and annexed to the affidavit set out a long list of entries in the diaries of Mr. Pym, in the cash ledgers of Messrs. Tatham & Pym, in the draft costs books of the firm, in the diaries of various clerks, and corresponding entries in the cash books and cost books of the firm relating to bills of costs, entries in Messrs. Tatham & Pym's expense ledgers and disbursement books, and corresponding entries in cash books and cost books—all relating to the affairs of the

testatrix Mrs. Wood—under various dates, from July, 1881, to April, 1889, inclusive.

Against so much of the registrar's order as directed her to produce these documents for the inspection of the defendants the plaintiff now appealed, and the appeal, having been originally heard in Chambers, was adjourned into Court.

The defendants had given notice of a motion to direct the administrator pendente lite to inspect the documents, to take copies of them, and to furnish the copies to the defendants.

R. T. Reid, Q.C., (*Searle*, with him), for the plaintiff. The order made by the registrar cannot be supported. The documents are the private property of Mr. Pym, and the plaintiff has no power to comply with the order if it were upheld. There is a broad distinction between Mr. Pym in his character as solicitor for the plaintiff, and Mr. Pym in his character as solicitor for the testatrix. All the papers which were the property of the deceased have been produced; but the papers in question are private entries made and used by Mr. Pym and the clerks in his office for the purpose of carrying on the business of the office, making out bills of costs, &c., and the petitioner has no more right to see them than to see the documents relating to the affairs of any other of Mr. Pym's clients. Mr. Pym is not a party to the suit, and if he is to be compelled to produce these papers he ought to have notice that the Court may hear any objection which he may make to the inspection. How is the plaintiff to obey the order supposing it were made? She can only repeat what she has said—that she has no control over these papers, and no power to produce them. It is a mere accident that the solicitor of both the testatrix and the plaintiff is the same person. If Mr. Pym or any of his clerks were put into the box and called on to produce these papers, it would be a different matter; but the plaintiff has no more power to produce them than she would have to produce the books of any person with whom she transacts business.

Sir R. Webster, Q.C., A.G., Bayford, Q.C., and *Barnard*, with him, for the defendants. All the parties to the action have a right to inspect these papers, inasmuch as they were the documents of the testatrix. It may be that if this order for inspection

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stands the plaintiff may be able to evade the production of the documents; but the registrar was right in making the order that as far as it was in the power of the plaintiff she should produce them, and it is no answer to say that they are the private property of her solicitor. The practice of the Court has been not to allow a litigant who objects to the production of documents to set up a property in them as against other parties. In *Hunt* v. *Anderson* (1), Lord Penzance held that the Court of Probate had as extensive power as the Court of Chancery or the Courts of Common Law to compel discovery. If these documents are in the possession of Mr. Pym, it is in his capacity as solicitor of the testatrix, and the testatrix would have been able to enforce their production on the ground that they were entries made on her behalf and in the transaction of her affairs.

[JEUNE, J. In a proceeding against the testatrix by a third person, could such person get at the contents of these documents otherwise than by subpœna duces tecum to the solicitor?]

The solicitor only holds the documents as the agent of the testatrix, and primâ facie, the possession of the solicitor is the possession of the party. Suppose a question had arisen in the lifetime of the testatrix—suppose the plaintiff had sold stock belonging to the testatrix, and an action had been brought. The testatrix would have had a right to ask for production of all the entries in the solicitor's books referring to the transaction, and it would have been no answer to say that the entries were the private property of the solicitor. The fact that the books in which these entries are made are the private property of the solicitor has never been held to be a sufficient ground for declining to make an order that they should be produced.

[JEUNE, J. Suppose the plaintiff wished to see these documents and Mr. Pym declined to produce them, in what way could she compel him to shew them to her?]

By filing a bill of discovery. Ever since *Hunt* v. *Anderson* (1) orders have been made for the production of documents, and the sole question has been whether they were testamentary papers or not. The plaintiff has admitted that these documents are in the hands of Mr. Pym as solicitor for the testatrix. She is a party to

(1) Law Rep. 1 P. & D. 476.

the suit, and the Court has power to order that the documents shall be produced as far as she is concerned. *Walburn* v. *Ingilby* (1) is an authority for contending that where books and papers, the joint property of a litigant and other persons not before the Court, are in the hands of a third party, the Court can make an order against the consent of the owners not parties to the suit.

[JEUNE, J. Is there any precedent whatever for an order for the production by a party to an action of the private books of any person with whom or through whom that party has done business?]

Not unless they are documents which the parties have a right to see, and as to them the settled practice of the Court has been not to recognise the right of any party to refuse inspection on the ground that they are private property.

[JEUNE, J. Is there any authority for saying that a client can obtain inspection of the private books of his solicitor by bill or action of discovery?]

As against the testatrix there are no such things as private books unless they are privileged. These are entries made on behalf of the client, entries relating to bills of costs, &c., of which a solicitor can be compelled to give inspection. There may be entries among them having relation to the deceased and her affairs, to instructions to prepare wills, and similar matter. Suppose an action were brought against an agent for the misappropriation of funds, and suppose the solicitor who disbursed the money were dead, a bill of discovery would lie against the remaining partners of his firm to produce the costs books relating to the affair; they could be compelled to produce them unless some question of lien or privilege arose. They could not allege that the books were their private property. It is not a question of property, but of the right of inspection. The solicitor could be compelled to produce these documents in Court on a subpœna duces tecum, and no distinction can be drawn between the two cases. It may be said that until the suit is decided it is not known who is entitled to represent the deceased; but in the meantime the Court takes care that all information shall be

(1) 1 My. & K. 61.

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before it to enable it to come to a correct decision, and it requires an affidavit of scripts setting out every document relating to the testamentary affairs of the deceased whether in possession of the parties or not. [They cited *Gaskell* v. *Chambers* (1); *Warde* v. *Warde* (2); *Woodhatch* v. *Freeland* (3); *Flight* v. *Robinson* (4); *Eglinton* v. *Lamb* (5); Bray on Discovery, p. 195; Hare on Discovery, p. 175; Tristram's Contentious Practice, p. 196 (ed. 1881).]

R. T. Reid, in reply. The answer to the application is that the plaintiff cannot produce these documents because she has not got them, and if the order were made she could not comply with it. Whatever the rights of the testatrix may have been, the plaintiff has no right over the documents. *Flight* v. *Robinson* (4) is against the order, because there the Court refused to order inspection on the ground that the documents were private books. In the other cases the documents either belonged to the testatrix or the client, and had come into the possession of the solicitor as their agent.

Bayford, Q.C., for the defendants. As to the summons against the administrator pendente lite, though it is not pressed now it is not abandoned. It was thought that if the defendants had no right to inspect these documents, the administrator might be the proper person to inspect them.

C. A. Middleton, for the administrator. Such an order is entirely unprecedented. It is no part of the administrator's functions to go to a solicitor's office and inspect documents and take copies of them. It is not his business to assist either litigant.

Cur. adv. vult.

JEUNE, J. There are two motions before me in this action. Mrs. O'Shea, the plaintiff, who propounds certain wills and codicils alleged to have been made by a relative, Mrs. Wood, some of which are contested by the defendants, is employing as her solicitor in this action Mr. Pym, who was previously employed by Mrs. Wood as her solicitor in various legal matters. The plaintiff, in the second paragraph of an affidavit of documents

(1) 26 Beav. 303.
(2) 3 Mac. & G. 365.
(3) 11 W. R. 398.
(4) 8 Beav. 22.
(5) 14 W. R. 170.

filed on December 22, 1890, says, "that Mr. Horatio Noble Pym, who is my solicitor in this action, has, I believe (because I am so informed by him), diaries, extracts from diaries, cash ledgers, expense ledgers, cash books, disbursement books, and bankers' cash books, containing entries and memoranda relating to the deceased and her affairs. Such books the said H. N. Pym informs me and I believe they are his private property. I have no control over them, and therefore cannot say what they contain. Such books are not in any way in my possession or power, nor are they in the possession or power of the said H. N. Pym as my solicitor." In a further affidavit, which she was ordered to make, the plaintiff says:—

"I refer to the second paragraph of my former affidavit of documents filed herein on December 22, 1890, and I say that Mr. H. N. Pym, who is my solicitor in this action, was the solicitor for the deceased Anna Maria Wood for many years before her death, and I am informed by the said H. N. Pym, and I believe, that he has in his possession as her solicitor, diaries, extracts from diaries, cash ledgers, expense ledgers, disbursement books, and bankers' cash books, containing entries and memoranda relating to the deceased and her affairs as set out in the following schedule which he has furnished to me. I have no knowledge of the said entries and memoranda except from the information so furnished to me by the said H. N. Pym, and they are not in my possession or power, and he claims the books and documents mentioned in the schedule as his private property."

The schedule which follows sets out in detail, and with dates, a list of documents corresponding with the description in the affidavit. A point was made before me of the second affidavit stating that the documents were in the possession of Mr. Pym as solicitor to Mrs. Wood; but it was admitted by the Attorney-General, for the defendants, that all the documents in question were the property of Mr. Pym, and I think I must take it, on the affidavits, that the documents constitute the ordinary private books of a solicitor, and that they are not in the possession of the plaintiff nor in her power, except in a sense which I shall presently mention as suggested. An order was made on the plaintiff by the registrar on January 15, 1891, to produce these documents,

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and an appeal from that order constitutes the first of the motions before me. Orders have been made on the plaintiff in this action for the production of certain documents in the possession of Mr. Pym which admittedly belonged to Mrs. Wood. The parties to this action undoubtedly have a right to have any relevant documents belonging to Mrs. Wood before the Court, and no objection was taken, if objection could be taken, to an order on the plaintiff for such purpose. But the question now is whether she can be ordered to produce the documents which never belonged to Mrs. Wood, but which are the private property of Mrs. Wood's solicitor, who happens to be the same person as the plaintiff's solicitor. I am of opinion that she cannot; and I base my decision on the short ground that the documents in question are not in her possession or power. The Attorney-General relied on the cases of *Hunt* v. *Anderson* (1); *Gaskell* v. *Chambers* (2); *Warde* v. *Warde* (3); and referred to Hare on Discovery, p. 175, and Tristram's Contentious Practice, ed. 1881, p. 196. It will be seen, however, that these authorities refer only to documents which are the property, not of a solicitor, but of a testator or a party to an action. Reference was also made to the case of *Flight* v. *Robinson* (4); but this case is an authority against the contention of the defendants, because Lord Romilly, the Master of the Rolls, refused to order the production by the defendants of their solicitors' books, whether letter books, journals, ledgers, or others, not, as I read the case, because they were privileged, for to some of them privilege did not extend, but because they were the property of the defendants' solicitors, and not of the defendants.

The cases, such as *Reid* v. *Langlois* (5) and *Airey* v. *Hall* (6), which decide that a principal cannot be called on to produce the private books of his agent, are, I think, authorities in principle to the same effect. Mr. Pym must for the purposes of this motion be treated as the solicitor of a stranger, and if a party to an action cannot be ordered to produce the books of his own solicitor, as not being in his possession or power, à fortiori he

(1) Law Rep. 1 P. & M. 476.
(2) 26 Beav. 303.
(3) 3 Mac. & G. 365.
(4) 8 Beav. 22.
(5) 19 L. J. (Ch.) 337.
(6) 2 De G. & Sm. 489.

cannot be ordered to produce the books of the solicitor of someone else. But it was strongly urged by the Attorney-General that, even if the documents were the property of the solicitor, Mrs. Wood could by an action of discovery have obtained an inspection of them; that the plaintiff, as claiming to represent Mrs. Wood, has the same power, and that she should therefore be ordered to allow inspection of the documents to the defendants, or rather obtain it for them. But it is an obvious obstacle to such contention that no such order is asked for by this motion, and that no such order could be made without notice to Mr. Pym. Supposing, however, these difficulties surmounted, there remain, I think, two fatal objections. In the first place, if the plaintiff, as claiming to represent Mrs. Wood, can enforce discovery and inspection of these documents against Mr. Pym, so also can the defendants, and there would seem no reason for them to obtain any order against her for such purpose. Secondly, I asked in vain for any authority for the proposition that Mrs. Wood could on a bill or in an action of discovery have obtained inspection against her solicitor of his private books. The cases of *Woodhatch* v. *Freeland* (1) and *Eglinton* v. *Lamb* (2) were referred to as authorities for a power on the part of a client to inspect his solicitor's books. But these cases do not shew that a client may inspect his solicitor's books for the purposes of proceedings against other persons. In the former of these, Kindersley, V.C., said: "The ordinary books of a solicitor were not documents of a client, although whether he had a right to production of them was another question." But no order was made in that case for the production or inspection of such books. On the contrary, it would seem that production of such books had been previously refused. In the latter case, the same learned judge was dealing, not with the solicitors' books of the ordinary kind, but with an account kept by solicitors of rents collected for their clients. Yet even in this case the Vice-Chancellor said that the client could not be compelled to get copies for the purpose of scheduling them, and added: "There is no right to have a solicitor's books—no more right in the client to have a solicitor's books than to require possession of the books of a banker."

(1) 11 W. R. 398. (2) 14 W. R. 170.

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It was further urged that to obtain these documents by subpœna duces tecum at the trial would not meet the objects of the defendants. Possibly not. It may or may not be a fault in the law of evidence, and one not remedied by Order XXXVII., r. 7, as now interpreted, not to allow sight to be gained before action of documents which can be obtained from a witness at the trial. But, as was pointed out long ago by Lord Eldon in *Fenton* v. *Hughes* (1), that affords no ground for ordering discovery where not otherwise allowable. It was suggested that it has been the practice of this Division to make an order such as the defendants ask. I have made inquiries, and am informed that no such order is known to have been made, and certainly that the point now raised has not been hitherto considered. Mr. Bayford suggested that some of the documents might be in the nature of scripts; but they are not shewn to be so, and if they were they could be obtained by a subpœna to Mr. Pym under the 23rd section of the Probate Act of 1858. The other motion before me, which was not before the registrar, asks for an order upon the administrator pendente lite to inspect the documents in question. It is sufficient, I think, to say that no precedent or authority for such an order was even suggested. There will, therefore, be no order upon either of these motions. Costs of the parties will be costs in the action. The administrator pendente lite to have his costs out of the estate.

Solicitors for plaintiff: *Tathams & Pyms.*

Solicitors for defendants: *Western & Sons.*

Solicitors for administrator pendente lite: *Venning, Sons, & Mannings.*

(1) 7 Ves. 287.

W. L.

IN THE GOODS OF SIR J. E. BOEHM.

1891
March 2, 9.

Probate—Will—Mistake—Name of Legatee wrongly described—Grant of Probate with Name omitted.

A testator in giving instructions for the preparation of his will directed that a bequest of 10,000*l.* should be given to each of his unmarried daughters "Georgiana" and "Florence." The conveyancer who prepared the will, by inadvertence inserted the name of Georgiana in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the name of Florence altogether. The draft was not read over to the testator at any time, and the error was not brought to his notice:—

Held, that probate of the will, omitting the name of Georgiana in the second clause of gift, might be granted to the executors.

MOTION for a grant of probate of a will with certain alterations.

The testator, Sir J. E. Boehm, R.A., died December 24, 1890, leaving a will duly executed bearing date December 12, 1889.

The instructions for the preparation of the will were given to Mr. Mills, an old friend, who conveyed them to the testator's solicitor, by whom they were laid before counsel to prepare a draft will.

From the affidavits of these gentlemen it appeared that by his instructions the testator directed that two sums of 10,000*l.* each, part of a specific sum of 24,000*l.* dealt with in the will, should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife, who was to have the life interest if she survived him. By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the word "Florence" altogether; so that there were two gifts of 10,000*l.* to Miss Georgiana Boehm, while Miss Florence Boehm was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will together, with an epitome of its provisions, were taken to the testator by Mr. Mills. The draft was never read over to him, but the epitome was. In the epitome the names "Georgiana" and "Florence" were accurately given, and the

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testator read it over and made corrections in it. The testator did not read the will over at the time of execution, and it was perfectly certain that his attention was not drawn to the mistake, which was only discovered after his death.

Bayford, Q.C., (*Barnard*, with him), on behalf of the executors. The executors ask for probate of the will, omitting in two places the word "Georgiana" in the second clause of gift, where it was evidently inserted by mistake for "Florence." It is clear that to this extent the testator signed something of which he did not know and approve, and the will as it stands does not carry out his intention.

[JEUNE, J. But will it if the word "Georgiana" is struck out?]

It is clear that the testator did not intend to give two sums of 10,000*l.* to "Georgiana," and probate may be granted of a will with blank spaces in it, leaving it to the Court of construction to determine what word the testator intended to stand there. Wills are constantly admitted to probate with blanks because the Court is unable to make out what was intended to be inserted. Here it is certain that the intention of the testator was to leave 10,000*l.* to somebody, and it may be left to the Court of construction to say whether it is possible to ascertain and carry out his intention.

In *Morrell* v. *Morrell* (1), the word "forty," which had been inserted by mistake, was struck out.

[JEUNE, J. But that did not alter the sense. The words "my shares" without the word "forty" expressed the testator's meaning. My difficulty here is, that by striking out the word "Georgiana" and leaving a blank you do not leave the will as the testator intended it to be, and you may be giving a different sense to it, or leaving it without any sense.]

You leave the words in of which the testator knew and approved, and you strike out the words of which he did not know and approve. In *Morrell* v. *Morrell* (1), the Court actually made a new will for the testator, inasmuch as the practical effect of striking out the word "forty" was to give a bequest of 400 shares.

(1) 7 P. D. 68.

[JEUNE, J. Is it usual to do this on motion?]

In the Goods of Duane (1), was on motion, and there have been other cases.

In *Fulton* v. *Andrew* (2), it was held that there was no positive rule, but that each case must be judged by its own circumstances. *In the Goods of Bushell* (3), the Court substituted the name of one hospital for another; and in *In the Goods of Huddleston* (4), the word "including" was substituted for "excluding." If the Court is satisfied that the word "Georgiana" was inserted without the knowledge of the testator, and that the mistake was not brought to his attention, the authorities shew that the word may be struck out.

In *Harter* v. *Harter* (5), where Sir J. Hannen refused to strike out a word, the will was read over to the testator, and he must have been assumed to know and approve of it.

R. M. Middleton, for Miss Georgiana Boehm, and *Crosse*, for the other members of the family, appeared to consent to the motion.

Cur. adv. vult.

JEUNE, J. I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word Georgiana omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion; but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it. It is clear from the evidence that the testator intended to give 20,000*l.* in equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly expressed this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read

(1) 2 S. & T. 590.
(2) Law Rep. 7 H. L., at p. 460.
(3) 13 P. D. 7.
(4) 63 L. T. (N.S.) 255.
(5) Law Rep. 3 P. & D. 11.

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or have read over to him the will, but did read what professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word Georgiana was clearly inserted in the two places in question in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of *Morrell* v. *Morrell* (1), following *Fulton* v. *Andrew* (2), and the earlier authority of *In the Goods of Duane* (3), mistake is to be regarded as a question of fact depending on the circumstances of each case, and there is now no difficulty, in circumstances such as those of the above cases, in striking out a clause, or a single word, if shewn to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in *Fulton* v. *Andrew* (2), in reference to the decisions in *Atter* v. *Atkinson* (4), *Guardhouse* v. *Blackburn* (5), and *Harter* v. *Harter* (6), from a presumption of knowledge and approval arising from the reading of, or hearing read, a will by a competent testator, because here the evidence is that the testator, relying on the epitome, never read or heard the will read.

My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word Georgiana and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in *Morrell* v. *Morrell* (1) if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number, "four hundred," instead of "forty"—in fact, had answered the second question put to them differently from the way in which they did. The cases of *In the Goods of Bushell* (7) and *In the Goods of Huddleston* (8) refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee in

(1) 7 P. D. 68.
(2) Law Rep. 7 H. L. 448.
(3) 2 S. & T. 590.
(4) Law Rep. 1 P. & D. 665.
(5) Law Rep. 1 P. & D. 109.
(6) Law Rep. 3 P. & D. 11.
(7) 13 P. D. 7.
(8) 63 L. T. (N.S.) 255.

Rhodes v. *Rhodes* (1) points to the difficulty of rejecting words where their rejection alters the sense of those which remain. But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

Solicitors to executor and all parties: *Witham, Lambert, & Roskill.*

W. L.

IN THE GOODS OF BARKER.

March 19, 24.

Probate—Will—Executor absent from the Country—Power of Attorney—Grant of Probate to Attornies.

An executor who was absent from the country, and who was expected to be absent for two years, had before his departure executed a power of attorney, in general terms, enabling the persons named in it to act for him about all his concerns or business of every kind whatsoever as fully and effectually as he himself could do, and also to appear for him in any Court of justice in any action or proceeding to which he might be a party:—

Held, that the power was sufficiently wide to justify the Court in making a grant with the will annexed to the parties named in it for the use and benefit of the executor.

APPLICATION for probate.

G. Richard Barker, late of Great Yarmouth, in the county of

(1) 7 App. Cas. 192.

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IN THE GOODS OF BARKER.

Norfolk, died January 5, 1891, leaving a will, duly executed on July 20, 1889, whereby he appointed Bazett Michael Haggard his sole executor.

Mr. Haggard left this country in November, 1890, for Samoa, where he had been appointed Her Majesty's Commissioner. It was expected that he would be absent two years, and three or four months must elapse before any communication could be had with him. The estate of the testator comprised plate, jewelry, and other articles which required protection. A grant ad colligendum, with liberty to pay debts and testamentary expenses, had been made to Mrs. Barker, the widow of the testator; but this was not found sufficient for the protection of the estate.

On November 4, 1890, Mr. Haggard executed a power of attorney to Mr. Fenwick and Mr. Lofthouse, in which there were the following passages:—

"And I also authorize my said attorney or attornies to appear for me in any Court of justice in any actions or other proceedings which may be instituted against me or whereunto I shall be a party, to defend the same, or to suffer judgment to be had or given against me in any such action or other proceeding, by default or otherwise, as my said attorney or attornies shall be advised or think proper"; "or generally to do, execute, and perform any other act, matter, or thing whatsoever which ought to be done, executed, or performed, or which in the opinion of of my said attorney or attornies ought to be done, executed, or performed about my concerns, engagements, or business of every nature and kind whatsoever, as fully and effectually, and to all intents and purposes as I myself could do if I were present."

Bayford, Q.C. (*R. H. Pritchard*, with him), moved for a grant of administration with the will annexed to the attornies for the use and benefit of the executor, and submitted that the language of the power of attorney was wide enough to entitle them either to take the grant or to renounce.

[JEUNE, J. Is there any authority for such a grant? It seems as if it were not in Mr. Haggard's affairs that these gentlemen seek to act, but in the testator's.]

There are no authorities which would govern this case; but it

is submitted that the business of the executor is Mr. Haggard's business.

JEUNE, J. On the whole, looking at the general powers given to these gentlemen, in connection with the language relating to proceedings in a Court of justice, I think I am justified in giving them a grant of administration, with the will annexed, as attornies of Mr. Haggard.

Solicitors: *Field & Roscoe.*

W. L.

IN THE GOODS OF SEAMAN.

March 24

Probate—Two Wills—Property in England and Canada—Independent Grant for English Will—Affidavit as to Moveables.

A testator possessed of property in England and Canada made two wills, each purporting to be independent of the other, and disposing only of the estate situate in the country to which it referred:—

Held, that probate might be granted of the English will on an affidavit being filed exhibiting a copy of the Canadian will, and a statement that such affidavit had been filed being indorsed on the probate; but that an affidavit must be made that the moveable chattels bequeathed by each will were actually at the time of the death of the testator in the country to which the will which disposed of them referred.

THE Rev. John Benwell Seaman, late of Ridgemount, in the county of Berks, died May 7, 1890. On February 14, 1889, the deceased duly executed two wills, one referring to his property in Canada, the other to his property in England. By his Canadian will he appointed his daughter, Helen Webb, his sole executrix. In its terms it purported to be "my last will and testament as far as concerns my property in Manitoba, Canada, and any articles hereinafter specifically mentioned." This will was proved at the Eastern Judicial District of the Province of Manitoba.

The English will in like terms purported to be "my last will and testament as far as concerns my property in England, and any articles hereinafter specifically mentioned." He appointed his wife Emma Seaman his sole executrix, and he constituted her his universal legatee with the exception of a

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watch, portrait of his mother, silver salver, and some other articles, which he gave to his son.

B. Deane, moved for a probate of the English will without requiring the executor to bring in the Canadian will, on an affidavit being filed exhibiting a copy of it, and a statement being made in the probate that this had been done.

[He cited *In the Goods of Astor* (1), and *In the Goods of Callaway*. (2)]

JEUNE, J. The grant may go in the form sanctioned by these two authorities; but there must be an affidavit shewing that the moveables mentioned in the Canadian will were in Canada at the time of testator's death, and also that the moveables mentioned in the English will were in England.

Solicitors: *Barker & Nairne.*

W. L.

March 17

LEWIN *v.* LEWIN.

*Judicial Separation—Husband Convicted of Aggravated Assault—Order of Justices for Separation and Maintenance—Appeal—*41 & 42 *Vict. c.* 19, *s.* 4 —24 & 25 *Vict. c.* 100, *s.* 43.

A husband having been convicted of an aggravated assault on his wife under the 43rd section of 24 & 25 Vict. c. 100, and the justices in petty sessions having made an order that his wife should be no longer bound to live with him, and that he should pay a weekly sum for her maintenance, appealed to this Court against the conviction and the order:—

Held, that the appeal given by s. 4 of 41 & 42 Vict. c. 19, was against the order for separation and maintenance, and not against the conviction.

APPEAL from a conviction for aggravated assault under 24 & 25 Vict. c. 100, s. 43, and a separation order under 41 & 42 Vict. c. 19, s. 4, by justices in petty sessions.

On the 16th of February, 1891, the justices sitting in petty sessions at Harling, in the county of Norfolk, convicted the appellant, Charles Sutton Lewin, of an aggravated assault on his wife, Rosetta Lewin, under 24 & 25 Vict. c. 100, s. 43, and inflicted a fine of 40*s*. They also made an order under the

(1) 1 P. D. 150. (2) 15 P. D. 147.

4th section of 41 & 42 Vict. c. 19, that Mrs. Lewin should no longer be bound to live with her husband, and that he should pay her a weekly sum for her maintenance.

The circumstances of the assault, as related by Mrs. Lewin and corroborated by a servant, were these: Mr. Lewin entered her bedroom, where she was keeping her bed through illness, at eleven o'clock one morning, under the influence of drink, with a knife in his hand, leaning over the bed and flourishing it in her face; that during the day she heard him down below declaring that "he would do for her"; that through fear she concealed herself under a bed in one of the rooms; that while so concealed he entered the room searching for her; and that ultimately she escaped through a window in her dressing-gown, and took refuge in the house of a clergyman; and she stated further that she was afraid to resume cohabitation with her husband.

Poyser, for the appellant. There was no evidence to warrant the justices in convicting the appellant of an aggravated assault.

[JEUNE, J. You may argue that the justices had no ground for concluding that the future safety of the wife was in peril, and that the separation order therefore was wrong; but it seems to me that there is no appeal to this Court against the conviction for an aggravated assault.]

The words of s. 4 of 41 & 42 Vict. c. 19, are wide enough to give an appeal against the conviction, as well as against the order following it. Before the justices could make an order for judicial separation and alimony, the party against whom it was made must be shewn to have committed an aggravated assault. The conviction and the order must, therefore, be regarded as orders coming under the 4th section. (1) If that were not so, there would be no appeal whatever from a conviction for an aggravated assault under s. 43 of 24 & 25 Vict. c. 100, in cases where, as here, the court of summary jurisdiction did not impose a fine of 10*l.* or upwards, with imprisonment in default of payment of the fine. The plain meaning of the section is, that this Court can

(1) The material words of the section are, "and provided also that all orders made under this section shall be subject to appeal to the Probate, Matrimonial, and Admiralty Division of the High Court of Justice.

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LEWIN v. LEWIN.

go into the whole circumstances of the case to see whether there was an aggravated assault or not. The justices seem to have made up their minds that the parties ought to be separated, and thereupon they found the husband guilty of an aggravated assault. There may have been a technical assault; but there was nothing to warrant the justices in coming to the conclusion that the future safety of the wife was in peril.

H. Browne, for the respondent. The conviction of the magistrates is final, and this Court cannot go behind it. As to the separation order, the circumstances of the case fully justified the magistrates in coming to the conclusion that the safety of the wife was in peril, and, unless the Court is satisfied that there was no evidence to justify the order, it cannot be set aside. [*Woods* v. *Woods* (1), and *Powell* v. *Powell* (2), were referred to.]

JEUNE, J. The only question which I have to decide here is whether the magistrates were right in coming to the conclusion that the future safety of the wife was in peril. Mr. Poyser has suggested a much larger and more difficult question, whether the conviction for an aggravated assault could be justified; but I do not think that I have any right to enter into that question. In my view, 41 & 42 Vict. c. 19, which gives an appeal to this tribunal from all orders made under s. 4, does not give an appeal from conviction for an aggravated assault, but only from the order made upon the conviction. It is not contended that I am not bound by the cases of *Woods* v. *Woods* (1) and *Powell* v. *Powell* (2); and if these cases are to be taken, as they must be, to be rightly decided, they seem to me to cover all the ground in this case, except the propriety of the magistrates' decision, that the future safety of the wife was in peril. The conviction must be taken to be good, although the magistrates did not inflict as large a fine as they could have inflicted under s. 43 of 24 & 25 Vict. c. 100. Then it is suggested, that although the decision of the magistrates in this case may not be invalid by reason of their not inflicting a fine under s. 43, still an appeal lies, because if they had fined the man the full amount which they might have fined him under 24 & 25 Vict. c. 100, he would have had an

(1) 10 P. D. 172. (2) 14 P. D. 177.

appeal; and it is said the appeal to this tribunal is in substitution of the appeal which he would otherwise have had. That, however, is only saying that there ought to be an appeal, and it does not appear to me to be of any weight in determining whether 41 & 42 Vict. c. 19, s. 4, does on the true construction of the section give an appeal against a conviction for an aggravated assault. Assuming, then, that there was a good conviction for aggravated assault; if I have a right to examine the evidence to see whether the justices were right in deciding that the safety of the wife was in peril, it appears to me that they came to a very sensible conclusion. On the evidence as it stands, I should have been extremely likely to come to the same conclusion. I do not know, however, that I need go so far, because the justices had means of deciding which I have not. They had the woman before them; they had the opportunity of judging her language and demeanour. It is clearly, therefore, impossible for me to say that there is not enough in the circumstances of the case to justify the magistrates in deciding that the future safety of the wife was in peril. This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Storey & Cowland.*
Solicitor for respondent: *F. A. K. Doyle.*

W. L.

1891
April 23, 24; May 4, 7.

THE NEW PELTON.

Admiralty—Collision—Duty of Steam Vessel turning round in River Thames—Thames Navigation Rules, arts. 17 (*c*), 18.

By art. 17 of the Rules for the Navigation of the River Thames, "When two steam vessels are in sight of one another, and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take . . . . (*c*) three short blasts of a steam whistle, each of about three seconds duration, shall mean "I am reversing my engines."

By art. 18, "When a steam vessel is turning round . . . . she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds duration.

A steam vessel turning round in the River Thames, and at a time when, as part of the manœuvre, she was reversing her engines, gave, to a steam vessel in sight, and approaching with risk of collision, the three-blast signal prescribed by art. 17:—

Held, that she was bound to make the four-blast signal, prescribed by art. 18, when beginning to execute the manœuvre of turning round, the object of the four blasts being to give notice, in due time, that a manœuvre of the kind is about to be carried out.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Plover*, the defendants were the owners of the steamship *New Pelton*.

The material facts—on the question of the time when the proper signal should be given in the case of a steam vessel executing the manœuvre of turning round in the River Thames—were shortly as follows:—

On February 9, 1891, about 3 P.M., the weather being fine and clear, the wind easterly and light, the tide first quarter ebb, of the force of about two to three knots an hour, the *Plover*—an iron screw steamship of 561 tons register, 110 horse-power nominal, and manned by a crew of 19 hands—was at anchor, inside the buoys off the Custom House in Gravesend Reach, in the River Thames. In order to proceed to Newcastle in ballast, she tripped her anchor, intending to cant, cross over, and go down the river. When she was partly athwart the river—angling to the north side, with her head still up stream, and making from one to two knots headway, with her engines working easy ahead, and her helm hard a-port—a steamer, which proved to be the *New Pelton*, was observed coming down the

river about (it was alleged) one mile distant, bearing about two points on the port bow. As the *Plover* got more athwart the tide, her engines were put astern to assist in turning her head down the river, and, her headway being almost stopped, three short blasts were sounded on her steam whistle in accordance with art. 17 of the Thames Navigation Rules. (1) As the *New Pelton* was seen to be heading for the *Plover*, the latter, at the last moment, again sounded three blasts, but the two vessels came into collision to the north of mid-channel, about opposite the lower end of Tilbury Fort, the stem of the *New Pelton* striking the *Plover* almost at right angles on the port side, abaft the fore-rigging.

The *New Pelton* was a screw steamship of 470 tons net register, manned by a crew of 16 hands, and was bound from London to the Tyne in water ballast. She was proceeding down Gravesend Reach, in about mid-channel, with her head angling about half a point to the north shore. Her engines had been eased down whilst dropping her pilot off Rosherville Pier, and she was making about three knots an hour through the water, when a steamer, which proved to be the *Plover*, was seen about 1½ points on the starboard bow, well to the southward of the mooring buoys, heading up the reach about one-half to two-thirds of a mile distant. The engines of the *New Pelton* were shortly afterwards stopped on account of two sailing barges tacking down the reach in a direction to cross the steamer's course, and the *New Pelton* starboarded slightly to pass to the north of one of them. The *Plover* was then seen to be angling across the river, as if under a port helm, and the engines of the *New Pelton* were thereupon rung full speed astern, three short blasts of the steam whistle blown, and the helm put hard a-starboard; but the *Plover* did not continue to cross the river, and was apparently trying

(1) Rules and Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Order in Council, dated December 29, 1887:—

"Steam whistle signals.

"17. When two steam vessels are in sight of one another, and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take . . . .

"(c) Three short blasts of a steam whistle, each of about three seconds' duration, shall mean 'I am reversing my engines.'"

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to get her head down stream, when the collision occurred. The 7th paragraph of the statement of defence alleged that "Those on board the *Plover* improperly, and at an improper time, and without due warning, manœuvred so as to try and turn head down stream ahead of the *New Pelton*," and the *Plover* was charged (inter alia) with a breach of art. 18 of the Thames Navigation rules (1).

May 4. *Sir Charles Hall, Q.C.*, and *J. P. Aspinall*, for the plaintiffs, the owners of the *Plover*. The turning process occupied some time, so that from ten to fifteen minutes elapsed between the time of getting up the anchor and the collision. The *Plover* was athwart the river when the *New Pelton* came in sight, and when she was, in fact, reversing her engines she gave the three blasts required by art. 17 of the Thames Navigation Rules. As the *New Pelton* did not hear the three blasts, she would not have heard four blasts, and, in any event, it was immaterial that four blasts were not blown, as it was broad daylight and the manœuvres of the *Plover* could be plainly seen by those on board the *New Pelton*. Admitting that it was the duty of the *Plover*, under art. 24 (2) of the same rules, to keep out of the way of the *New Pelton*, the correlative duty was cast upon the *New Pelton* to keep her course, and by starboarding she broke art. 25 (3) of the same rules.

[Owing to the view as to the starboarding of the *New Pelton* taken by the learned judge in his judgment, the part of the case

(1) Rules and Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Order in Council, dated December 29, 1887:—

"18. When a steam vessel is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds duration."

(2) Rules and Bye-laws for the Navigation of the River Thames, allowed by Order in Council, dated March 18, 1880:—

"24. Steam vessels crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river."

(3) Ibid. "25. Where by the above rules one of two vessels is to keep out of the way, the other shall keep her course."

based upon arts. 24 and 25 of the Thames Rules does not call for report.]

Barnes, Q.C., and *L. E. Pyke*, for the defendants, the owners of the *New Pelton*. The whole manœuvre in process of execution by the *Plover* had only occupied a very few minutes up to the time of the collision. The going astern was part of the process of turning round, and the *Plover* should have signified that she was executing the manœuvre by giving, in due time, the four blasts of the steam whistle required by art. 18 of the Thames Rules.

[The rest of the arguments of counsel, and the references by both sides to the case of *The River Derwent* (1) sufficiently appear from the judgment.]

May 7. JEUNE, J. (after stating the nature of the case, proceeded):— I think it will be found that this case really turns upon the question of the length of time during which the *Plover* was engaged in turning round. The question is one partly of fact, and partly of nautical experience. According to the statement of the master of the *Plover*, some fifteen minutes elapsed during which she was occupied in getting across the river and into the position in which she was at the time of the collision. The view of the *New Pelton* is quite different: the witnesses from that vessel say that only three or four minutes were occupied by the *Plover* in getting athwart the stream, that is to say, from being in a position which was practically stationary opposite the buoys, to being in a position which was practically stationary athwart the river. On this point the Trinity Masters attach very great importance to the evidence of the mate of the harbour-master's launch. They think he is a person whose duty it would be to see what was going on in the river, and, according to his evidence, the shorter and not the longer time was occupied by the *Plover*. I have put to the Trinity Masters the practical question as to what time a vessel would take to execute the manœuvre which the *Plover* was intending to execute. They tell me that something like two or three, or at the outside four,

(1) 62 L. T. (N.S.) 45. Decision of the Court of Appeal affirmed by House of Lords, April 30, 1891.

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minutes would be the length of time a vessel in the position of the *Plover* would take in assuming the position she had at the time of the collision. I see that in *The River Derwent* (1), the Court of Appeal treated a similar question as one for the nautical assessors (2), and accepting the view of the Trinity Masters, I think that the shorter and not the longer time is the true account. Now if only some three or four minutes were occupied from the time when the *Plover* began to cant till the time of the collision, it follows that the *New Pelton* could only have been something like a quarter of a mile off before the collision took place. The Trinity Masters say that long before the *Plover* had assumed the position which she did, the *New Pelton* was well in sight of her, and that the *Plover* might have seen her coming down the river a considerable time before she began to cant out into the stream.

Now as to the conduct of the *Plover*. In the first place, it is said there was not a proper look-out. The master of the *Plover* admits that if he had seen the *New Pelton* before he began to cant, he would not have gone outside the buoys, but would have waited for the *New Pelton* to pass. He said he saw nothing, and had nothing reported as coming down the river, when he began to cant. It will be seen from the decision at which I have already arrived that this cannot be maintained. I think the *Plover* might have seen the *New Pelton* in sufficient time to have adopted the course which the master says he would have adopted if he had seen her. There is this further point. It is clear that the *Plover* never gave the four-blast signal at all, but only gave three blasts, and I think gave them when she was finally going astern. It appears to me clear on authority, and on the words of the rule itself, that she was bound to give the four-blast signal at the proper time in order to avoid the possibility of collision. In *The River Derwent* (1), the Master of the Rolls says that a vessel should give such a signal under such circumstances, and that the *River Derwent* broke the rule

(1) 62 L. T. (N.S.) 45.

(2) In giving judgment in the Court of Appeal, the Master of the Rolls said: "We are advised that from the time when the *Allendale* finally made up her mind to cross until the time when she and the *River Derwent* were in the position in which they were when the collision took place would be about four minutes."

by not giving the proper signal that she was going to cross. The President in that case goes a little further, because he says in his judgment (which was furnished to me from the case in the House of Lords) that "some signal is required from a vessel beginning to turn." If that is so the *Plover* ought to have given that signal before she executed the manœuvre which ended in the collision. It is said however that, as in the case of *The River Derwent* (1), there are two answers to this. It is said that the *New Pelton* would not have heard the four-blast signal, as she did not hear the three blasts. It is said further that the *New Pelton* could have seen the *Plover* executing the manœuvre, and therefore did not require the four-blast signal. With regard to the first point I have come to the conclusion that the three-blast signal was given when the *Plover* was finally going astern, which would be a minute and a-half or two minutes before the collision. I think this was the blast which the *New Pelton* heard, and that the second set of three blasts was only given in the agony of the collision, and probably the *New Pelton* did not hear it. As to the other point, I think that it is disposed of by the conclusion which I have already arrived at as to the question of the time occupied by the *Plover*. The *New Pelton*, in my view, could not tell till too late that the *Plover* was really going to place herself across the stream. It appears to me that the very object of a four-blast signal is to give notice in due time that a manœuvre of this kind is going to be executed. It is said further that the *Plover* made a mistake at the last moment by going astern and not going ahead. That is the view which the Trinity Masters take, they think it would have been safer to have gone ahead, that there was room for her to do so, and that if she had not gone astern the collision might not have occurred.

The other question that remains is as to the conduct of the *New Pelton*. Two charges are made against her. The first is, that she starboarded and so did not keep her course, and violated the 25th rule for the navigation of the River Thames. This charge is not made in terms in the statement of claim nor is any reference made to the rule in question. I doubt whether in these circumstances this charge, even if better founded than I think

(1) 62 L. T. (N.S.) 45.

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it is, should be allowed to be preferred, because it appears to me that reference should have been made to it at the earliest stage of the case, in order that the attention of the *New Pelton* might have been called to the matter, and opportunity given for tendering evidence in respect of it. But has it been proved that the *New Pelton* did really starboard? There is not much direct evidence on the point, but it is undoubtedly true that the *New Pelton* seems to have been at some time south of mid-channel, and it appears to be clear that the collision occurred north of mid-channel. It would seem by no means improbable that, the *New Pelton* having the choice on which side of the barge heading to the north she would go, chose the north rather than the south side, and starboarded to some extent. The view of the Trinity Masters is, I think I may say clearly, that she did not starboard at all. The facts I have mentioned would rather lead me to the conclusion that she did starboard, probably very slightly, and probably not more than might have been corrected by some slight after-action of the helm, or perhaps not more than would be corrected by the reverse action of her screw. But the view of the Trinity Masters is very clear as to this, which is really the governing consideration, that even if the *New Pelton* did slightly starboard in order to avoid the barge by going to the north, that was a perfectly proper course for her to take, and that she had a right, going down the river, to go north of the barge instead of south, and that she ought not to be held liable for negligence on that account. It is to be observed that the manœuvre was not executed in reference to the *Plover*, but with regard to the barge. It was a proper manœuvre in regard to the barge, and the Trinity Masters are of opinion, in which I coincide, that there is not established against her any charge of negligence in starboarding at that time, even if the fact of starboarding to the extent I have mentioned were established. The other charge against the *New Pelton* is that she did not reverse her engines in due time. It was, no doubt, her duty to reverse as soon as it was seen that there would be a collision, and her master admits that if he had known that the *Plover* was going to cant as she did he would have reversed at once. This question is again decided by the conclusion at which I have arrived as to the length of time

occupied by the *Plover* in getting across the stream. If it were the short time it is said to be by the *New Pelton*, and as I think it was, there was no time for the *New Pelton* to avoid the collision, even if she had stopped her engines. I therefore hold that the *Plover* is alone to blame.

Solicitor for plaintiffs, the owners of the *Plover*: *William Batham.*

Solicitors for defendants, the owners of the *New Pelton*: *Gellatly & Warton.*

T. L. M

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March 24; *April* 14; *May* 8

Admiralty—Salvage—Action in personam—Owners of Cargo in the Salved Ship out of the Jurisdiction—Practice—Service of Notice of Writ under R. S. C., 1883, *Order* XI., *r.* 1 (*g*)—*Apportionment of Costs.*

By the Rules of the Supreme Court, 1883, Order XI., r. 1, "Service out of the jurisdiction of . . . notice of a writ of summons may be allowed by . . . a judge whenever—(*g*) any person out of the jurisdiction is a . . . proper party to an action properly brought against some other person duly served within the jurisdiction":—

Held, that under this rule where, in an action in personam for alleged salvage services rendered to ship, freight, and cargo, the plaintiffs, the owners, master, and crew of the salving vessel, had served the writ upon the owners of the salved ship resident within the jurisdiction, leave might be obtained to serve the cargo owners, out of the jurisdiction, with notice of the writ.

In apportioning the costs of the salvor, payable by the owners of the salved ship and cargo respectively, *The Peace* (Swa. 115) followed.

MOTION by defendant cargo owners, out of the jurisdiction, to set aside the service, by the plaintiffs, upon them of notice of a writ served upon the defendant shipowners, within the jurisdiction, in an action in personam for alleged salvage services rendered to ship, freight, and cargo.

The facts were shortly as follows:—

On September 21, 1890, the screw steamer *Elton*, belonging to some of the defendants, whilst on her way from Nicolaieff with a portion of her cargo of grain belonging to the other defendants, stranded in the Black Sea. The screw steamer *Cervin*, belonging to some of the plaintiffs, came to her assistance, and, after some of the cargo had been jettisoned, succeeded in towing her off.

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The *Elton* then went on to Sevastopol to complete her cargo, and thence proceeded to Bergen, her port of destination. On October 26 the defendant cargo owners signed an average agreement whereby they consented to pay their contribution on adjustment of losses consequent on the stranding.

As the owners of the *Elton* refused to enter into the usual arrangement for bail to be given for ship, freight, and cargo, the plaintiffs were driven to commence their action against the shipowners resident in the United Kingdom, and apply for leave to serve the individual owners of the cargo at Bergen with notice of the writ. Accordingly, on November 24, 1890, a writ in personam, indorsed with a claim for 2500*l.* for salvage services, was issued by the plaintiffs, the owners, master, and crew of the *Cervin*, against Robert Ropner and others, the owners of the *Elton* and her freight, and against Aug. C. Mohr & Son and others, the owners of her late cargo, and was served upon the shipowners within the jurisdiction.

On December 9 the President (Sir James Hannen), on an ex parte application by the plaintiffs, under the rules of the Supreme Court, 1883, Order XI., r. 1 (*g*) (1), gave leave to serve notice of the writ on the defendant cargo owners at Bergen, and in pursuance thereof they were, on December 29, so served.

March 24. *Sir Walter Phillimore* and *Stubbs*, in support of the motion on behalf of the defendant cargo owners. Leave ought not to have been given to serve the notice of writ, for the alleged salvage services were rendered out of the jurisdiction in the Black Sea in respect of cargo which was shipped at Nicolaieff by a Russian firm under bills of lading to order, and by indorsement of such bills of lading the property passed, and delivery was made, to the defendants Aug. C. Mohr and others, who are Norwegians, residing at Bergen. The case is not within Order XI., r. 1 (*g*), as the cargo owners are not either "necessary" or "proper" parties to an action of salvage in personam against

(1) Rules of the Supreme Court, 1883, Order XI., r. 1: "Service out of the jurisdiction of . . . notice of a writ of summons may be allowed by . . . a judge whenever . . . (*g*) any person out of the jurisdiction is a . . . proper party to an action properly brought against some other person duly served within the jurisdiction."

the owners of the salved ship, for the plaintiffs can get an award of the amount of salvage to be paid by the shipowners, and can then proceed against the cargo.

[JEUNE, J. The case of *The Steamship Thanemore, Limited* v. *Thompson* (1), where leave was given to serve in Scotland some of the forty-four underwriters who were liable, seems in point.]

The consolidation rules apply in the case of underwriters who are all parties to the same policy; but this would not be so where there are distinct policies. In the present case the liability of the cargo owners is separate, and there is no settled practice to bring actions in personam against ship and cargo together. The average agreement, signed by the cargo owners, binds them to pay their contribution at Bergen, and it would be contrary to international comity to require these foreign cargo owners, resident in Norway, to appear and defend an action which has only been commenced here because the owners of the salved ship happen to be registered in this country. [The cases of *Five Steel Barges* (2), and the *Ocean Steamship Co.* v. *Anderson* (3), were also referred to.]

Butler Aspinall, for the defendants, the owners of the *Elton*.

J. P. Aspinall, for the plaintiffs, the owners, master, and crew of the *Cervin*. The defendant cargo owners may fairly be deemed "proper" parties within the meaning of Order XI., r. 1 (*g*), as it is manifestly convenient that all parties interested should be before the Court when the salvage action is tried. In the present case the cargo owners, by signing the average agreement, have undertaken to pay their average contribution arising out of the stranding, and the master of the vessel will therefore be able, under the Norwegian law, to collect the proportion of salvage due from the cargo as soon as an award has been made in the present action. In *The Peace* (4), Dr. Lushington points out the great injustice which would arise if cargo owners are to be allowed to stand by whilst the shipowner is involved in the cost of contesting a salvage action. The nature and condition of the cargo is a material element in considering the risk and difficulty attending the salvage operations, and the cargo therefore

(1) 52 L. T. (N.S.) 552.
(2) 15 P. D. 142.
(3) 33 W. R. 536.
(4) Swa. 115.

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cannot be ignored and the ship treated, for the purposes of the action, as if she were in ballast. This case falls within the principle laid down in *Massey* v. *Heynes* (1): viz., that if a foreigner resident out of the jurisdiction would, if he had been resident in England, have been properly joined to an action against a person resident in England, he will be a proper party to be served with notice of the writ. In the case of *Washburn, &c. Co.* v. *Cunard Steamship Co.* (2), Stirling, J., gave leave on similar grounds, holding that if the parties sought to be served with notice would, and could, have been sued had they been in this country, they were proper parties within the rule. There are many Admiralty cases shewing that proceedings as to salvage need not necessarily be in rem, and that a monition would issue against the owners personally of the property salved: *The Hope* (3); *The Meg Merrilies* (4); *The Rapid.* (5)

Cur. adv. vult.

April 14. JEUNE, J. [after stating the nature of the action proceeded:—] The only question is whether these owners of the cargo are proper parties to the action within the meaning of Order XI., r. 1 (*g*).

The case of *Massey* v. *Heynes* (1) has placed a clear interpretation on the meaning of this sub-section, and supplies a test for determining to what persons notice of a writ may be given. Wills, J. (p. 335), says: "I think that if, according to the regular practice of the courts of this country—supposing all parties subject to the jurisdiction—the person to be served is one who, as a matter of course, would be joined on the same writ, and be treated as one of the defendants in the action, he is a 'proper,' if not a 'necessary' party to the action"—and this view has been confirmed by the unanimous judgment of the Court of Appeal.

It may be remarked that the case of *Massey* v. *Heynes* (1) was one in which the defendants were alternatively liable, and in which, therefore, before Order XVI. they could not have been made parties, and the case therefore shews that all persons who could,

(1) 21 Q. B. D. 330.
(2) 5 Times Rep. 592.
(3) 3 Rob. 215.
(4) 3 Hagg. 346.
(5) 3 Hagg. 419.

at the option of the plaintiffs, be made parties under Order XVI., are proper parties within Order XI., r. 1 (*g*). Before the case of *Massey* v. *Heynes* (1), the Queen's Bench Division in *The Steamship Thanemore, Limited* v. *Thompson and Others* (2), held, that in an action against underwriters, severally liable, those in Scotland might be served with the writ; and shortly after it in the *Washburn, &c., Co.* v. *Cunard Steamship Co., and Others* (3), where an action was brought by the owners of a patent for making barbed wire to restrain the steamship company, who were carrying a consignment of such wire to the other defendants, Parkes & Sons, in Ireland, from parting with it, Stirling, J., held that Parkes & Sons might be served with the writ.

It was suggested by Sir Walter Phillimore that these last two cases referred to defendants in Scotland and Ireland, and that therefore Order XI., r. 2, applied. This is so; and, as Stirling, J., points out, it gives rise to considerations of convenience different than if the parties to be served be resident in other countries. But this only, I think, shews that there are cases when the Court will not give leave in regard to Scotch or Irish defendants where it would if they were foreigners—not that the Court can give a permission in respect of Scotch or Irish residents which it cannot in respect of persons out of the United Kingdom.

Applying the test thus furnished, it seems to me impossible to doubt that notice of this writ should be permitted to be given to the owners of the cargo. If they were within the jurisdiction, would they not be proper parties to the action? If they could be made so under Order XVI., and it seems to me they clearly could, the case of *Massey* v. *Heynes* (1) is in point, and is decisive of this motion; but the matter stands even on firmer ground, because I think that by the practice of the Admiralty Court they could always have been made parties. No doubt the great mass of cases in which both owners of ship and cargo have been made defendants have been proceedings in rem. But although salvage suits, in the form of actions in personam, are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action in rem having been brought

(1) 21 Q. B. D. 330. (2) 52 L. T. (N.S.) 552
(3) 5 Times Rep. 592.

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and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved. This is shewn by the cases of *The Hope* and *The Trelawney* (1), *The Chieftain* (2), *The Meg Merrilies* (3), and the language of the present Master of the Rolls in *Cargo ex Schiller*. (4) It does not clearly appear that in any of these cases proceedings were taken against the owners of ship and cargo as separate parties (although in *The Chieftain* (2) and *The Meg Merrilies* (3) this may perhaps have been the case); but I see no reason why such parties, if consisting of separate individuals, or sets of individuals, should not have been brought before the Court together by monition. It is indeed possible that the reason why the fiction by which the Admiralty Court maintained the proceeding in personam was allowed to prevail, and why actions for salvage at common law are so rare, is that the facility of bringing all parties before the Court gave advantages which the common law jurisdiction could not afford. But however this may be, every consideration, both of authority and principle, points to the convenience, and indeed the justice, of the owners of ship, freight, and cargo being all before the Court when the amount of salvage is to be determined. The case of *The Peace* (5) is an instance of the strong view taken by the Court of Admiralty on this point. In that case the ship and freight were first proceeded against and afterwards the owners of the cargo, and Dr. Lushington ordered the cargo owners to pay their share of the costs of the proceedings against the owners of the ship. "It is true," he said (p. 117), "the owners of the cargo did not come in in the original suit; they left the owners of the ship to defend the suit, and say they are now ready to pay their share of the salvage. Extreme injustice would be done if the Court were to sanction that course. The owners of the cargo would lie by, and then, when the owners of the ship had obtained a reduction of the amount of salvage claimed, they would take advantage of it." A little afterwards, in the case of *The Mary Pleasants* (6), Dr. Lushington dwelt on the difficulty in esti-

(1) 3 Rob. 215.
(2) 4 Notes of Cases, 459.
(3) 3 Hagg. 346.
(4) 2 P. D. 145, 149.
(5) Swa. 115.
(6) Swa. 224.

mating the remuneration to be paid by the ship apart from that to be paid by the cargo. This appears to be only consonant with common sense. It is easy to imagine cases such as that of a general ship, the cargo having possibly passed to many foreigners, in which separate actions against each individual owner would be impossible. Again, in the case of an agreement for the amount of remuneration which must be made by the master on behalf of cargo as well as ship (see *The Westminster* (1)), it would clearly be wrong if it can be avoided that the validity of such an agreement be called in question in several actions with possibly different results. But apart from any special circumstances, it would seem clear that when the question at issue depends on one set of facts, and is the determination of the total amount of remuneration which several persons have to pay, and which they all have to make good by general and apportioned contribution, all such persons should, if possible, be before the Court. It was argued by Sir Walter Phillimore that it would be against international comity to bring the case of these foreign owners of cargo here; but it appears to me that the principles of international comity may be more soundly invoked to sanction the determination of an entire question of salvage by the tribunal which is seised of a portion of it, especially as conflict of jurisdiction can always be prevented by compelling a plaintiff to elect under which tribunal he will proceed. I think, therefore, that this motion must be rejected.

May 8. The action of salvage was tried by JEUNE, J., with assessors, and resulted in an award of 1900*l.* in favour of the plaintiffs against the owners of the *Elton* and her freight, and against the owners of the portion of the cargo salved. As to the costs, the learned judge ordered that:—

(1.) The general costs of the action payable to the salvors should be apportioned as between the owners of the salved ship and her cargo, in accordance with the principles laid down in *The Peace* (2), but without prejudice to the salvors' right to recover the whole from either.

(2.) The costs of the motion to set aside the service of the writ

(1) 1 Wm. Rob. 229. (2) Swa. 115.

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to be borne exclusively by the cargo owners, as also any costs occasioned by the postponement of the case through the cargo owners not having appeared when first served with notice of the writ.

Solicitors for the plaintiffs, the owners of the *Cervin*: *Thomas Cooper & Co., agents for Lietch, Dodd, Bramwell, & Bell, Newcastle-upon-Tyne.*

Solicitors for the defendants, the owners of the *Elton*: *Pritchard & Sons.*

Solicitors for the defendant cargo owners: *Stokes, Saunders, & Stokes.*

T. L. M.

C. A.
April 15, 22.

[IN THE COURT OF APPEAL.]

WOOD *v.* WOOD.

Divorce—Permanent Maintenance to Wife—Clause dum sola et casta—29 & 30 Vict. c. 32, s. 1.

There is no rule that in an order granting permanent maintenance to a divorced wife the dum sola et casta clause ought to be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The Court must in each case determine what is reasonable, having regard to (1.) the conduct of the parties; (2.) their position in life, and their ages and their respective means; (3.) the amount of the provision made; (4.) the existence or non-existence of children, and who is to have the custody of them; and (5.) any other circumstances which may be important in any particular case.

The wife of an officer in the army obtained a decree for dissolution of marriage on the ground of adultery and cruelty. There was no child, and neither party had any property, the husband having only his pay. An order was made for permanent maintenance at the rate of 60*l.* a year, and Jeune, J., directed the insertion of the dum sola et casta clause, considering that there was a general rule for inserting it unless there was some reason for omitting it:—

Held, by the Court of Appeal, that there was no such general rule, and that in the present case, having regard to the innocence of the wife, the misconduct of the husband, the fact that the wife had no property, and the smallness of the allowance, the clause ought not to be inserted.

PETITION by wife for dissolution of marriage. The parties were married in England on January 2, 1884. The respondent was an officer in a regiment stationed in India, and in a few weeks the petitioner and respondent left England for India. While they were there the respondent treated the petitioner

with gross cruelty, and in April, 1885, he induced her to go to England. She rejoined him in India in 1886, but his behaviour was such that she could not live with him, and in December of that year she returned to England alone. In August, 1889, he arrived in France, being sent to England on sick leave. He had only contributed small sums, and very irregularly, towards his wife's maintenance. On December 31, 1889, a deed of separation was executed, by which the respondent agreed that, until he retired from the army, or was placed upon half-pay, he would pay to the petitioner during their joint lives, if she should keep the covenants thereinafter contained, and continue chaste, the yearly sum of 60*l.*, to be increased to 80*l.* upon his obtaining the rank of major, and to 100*l.* on his attaining the rank of colonel, and on his retiring or being placed on half-pay he agreed to pay her one-fifth of his pension or half-pay.

On February 7, 1890, the petitioner having discovered that the respondent had committed adultery in France, filed her petition for dissolution. On May 2 an order was made for alimony pendente lite at the rate of 60*l.* per annum. On August 6, 1890, a decree nisi for dissolution was made.

The petitioner had no fortune of her own. The respondent had no property, but lived, as he deposed, on his pay, which was 325 rupees per month, and would shortly be increased to 475. There was no child of the marriage.

The petitioner applied for permanent maintenance, and the registrar, on February 27, 1891, reported that the parties were agreed that there should be an order for 60*l.* a year, but disputed as to the insertion of the dum sola et casta clause. He suggested that the order should be made without any such condition. On March 24, 1891, Jeune, J., confirmed the report except as to the dum sola et casta clause, which the learned judge thought ought to be inserted.

The wife appealed from this decision as to the insertion of the clause.

April 15. *T. Terrell*, for the wife. In *Lander* v. *Lander* (1) an allowance of permanent maintenance, even to a guilty wife,

(1) [1891] P. 161.

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was made without the dum sola et casta clause, on the ground that the allowance was a bare maintenance. Here the allowance is a bare maintenance, and the wife is an injured and blameless woman. In *Lister* v. *Lister* (1), where a wife obtained a decree of dissolution, the Court gave her maintenance for her life, without the clause.

[LINDLEY, L.J., referred to *Harrison* v. *Harrison.* (2)]

The power of granting maintenance is given to the Court by 20 & 21 Vict. c. 85, s. 32, and 29 & 30 Vict. c. 32, s. 1. The present case comes within the latter enactment. The section does not require the insertion of any such clause, but leaves the allowance in the discretion of the judge. It is true that in *Gladstone* v. *Gladstone* (3), and in *Fisher* v. *Fisher* (4), it was said to be the practice to insert the clause; but that was only a following of the practice before the Act. The Act gives full discretion, and it is most reasonable that this small allowance should not be determined by a second marriage. In *Hart* v. *Hart* (5), the insertion of a dum sola et casta clause was considered not to be a matter of course.

Bayford, Q.C., and *Barnard*, for the husband. The section (20 & 21 Vict. c. 85, s. 32) gives an absolute discretion to the judge, and the Court of Appeal will be slow to interfere with the exercise of it. The usual course has been to insert the clause: *Fisher* v. *Fisher* (4); *Sidney* v. *Sidney.* (6) There are only two subsequent cases (*Lister* v. *Lister* (1) and *Lander* v. *Lander* (7)) in which the clause has been omitted, and that under special circumstances. *Harrison* v. *Harrison* (2) and *Medley* v. *Medley* (8) merely went to this, that where a deed is to be settled, the course is to discuss the question on the settling of the deed, and not to give a direction in the order.

Terrell, in reply. The present case is under 28 & 29 Vict. c. 32, which does not contain the same expressions as to discretion as the earlier Act. The Court of Appeal, therefore, will not feel the same difficulty in interfering with the decision below as it might have felt under the former Act.

(1) 14 P. D. 175; 15 P. D. 4.
(2) 12 P. D. 130.
(3) 1 P. D. 442.
(4) 2 Sw. & Tr. 410.
(5) 18 Ch. D. 670.
(6) 4 Sw. & Tr. 178, 182.
(7) [1891] P. 161.
(8) 7 P. D. 122.

1891. April 22. LINDLEY, L.J. This is an appeal from an order of Jeune, J., deciding that a sum to be paid yearly for the maintenance and support of the wife, who has obtained a decree for dissolution, shall be subject to the limitation dum sola et casta vixerit. The wife appeals from so much of the order as imposes that limitation.

The Court has a discretion both as to the amount to be paid and as to the time for which, and the conditions on which, the payment shall continue. This Court has constantly disclaimed its right to fetter the exercise by any judge of a discretion vested by Act of Parliament in him; but where a judge, in coming to a decision in a particular case, has apparently been guided by some supposed rule which this Court thinks erroneous, or has overlooked some material fact, this Court has not shrunk from acting on its own view, and reversing the decision in question. The Court, in truth, cannot act otherwise without abandoning its functions as a Court of rehearing and of appeal.

In this case it appears to us that Jeune, J., has proceeded on the assumption that the dum sola et casta clause ought to be inserted, unless there is some reason to the contrary. In our opinion there is no rule to this effect, nor is there any rule that the clause ought to be omitted unless there is some reason for inserting it. There is no rule one way or the other, nor ought there to be any; each case ought to depend on its own circumstances.

The jurisdiction is given to the Court by 29 & 30 Vict. c. 32, the preamble of which contains a recital that by s. 32 of the Divorce Act of 1857 it was enacted "that the Court may, on pronouncing any decree for a dissolution of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross or annual sum of money as to the Court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties. And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly

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or weekly payment to the wife during their joint lives." Then it is enacted, by s. 1, that "in every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable; provided always that, if the husband shall afterwards from any cause become unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same, as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

What is reasonable for her maintenance and support for the joint lives of the husband and wife is, therefore, what has in each case to be ascertained. The circumstances which have to be taken into account are—(1.) the conduct of the parties; (2.) their position in life, and their ages and their respective means; (3.) the amount of the provision actually made; (4.) the existence or non-existence of children, and who is to have the care and custody of them; (5.) any other circumstances which may be important in any particular case.

In the case now before the Court there are no children, and no particular circumstances in addition to those which fall under the first three heads. We have, therefore, only to consider those heads.

As regards the conduct of the parties, the wife here was the petitioner, and nothing is, or can be, said against her. The misconduct of her husband drove her to seek a divorce. This is very material in considering whether the words dum casta should be inserted, for, although on the one hand, as forcibly pointed out by Jeune, J., it is unjust to make an allowance cease on marriage, and not on illicit intercourse, yet, on the other hand, it is an insult to any woman of spotless character to provide against the contingency of her sinking so low as to render such a provision necessary. This view of the question is quite as important as the other.

As regards the position of the parties and their respective means, much must turn on those matters. The least that a man ought to do for the maintenance and support of his wife,

when he so disregards his own duties to his wife as to drive her from her home without any fault on her part, and practically force her to obtain a divorce, is to do what he can, consistently with his means, to maintain her in reasonable comfort, having regard to her age, health, and position in society. Both the amount he ought to allow her, and the duration of such allowance, ought to be fixed with reference to this consideration. The amount of her property, if any, ought obviously to be taken into consideration. If, as in this case, the husband's means are such that he can only allow his wife a bare subsistence, and she has nothing, it seems to us unjust to her that even this subsistence money should cease merely because she may marry again. The continuance of the allowance may conduce very materially to her marrying, and to her future comfort and happiness. On the other hand, justice to him does not, in our opinion, require the cessation of so small an allowance on her marrying again.

Under the circumstances therefore, of this case—viz., the innocence of the wife, the misconduct of the husband, the fact that the wife has no property, and the smallness of the allowance made to her—it appears to us that the clause dum sola et casta vixerit should be struck out. The husband must pay the costs of the wife's application and of the appeal.

KAY, L.J. I have had the advantage of reading the judgment of Lindley, L.J., and I concur entirely with everything he has said. Bowen, L.J., has authorized me to say that he takes the same view.

Appeal allowed.

Solicitor for the wife: *J. Banks Pittman.*

Solicitor for husband: *J. Pearce.*

H. C. J.

1891
April 28

CLARKE *v.* CLARKE.

Divorce—Husband's Petition—Wife's Costs—Non-compliance with Order for Security for Costs—Attachment refused.

In a petition by the husband for dissolution of a marriage, the petitioner had been ordered to pay or secure a certain sum for the respondent's costs of the hearing of the cause. The petitioner failed to comply with the order, alleging want of means on his part.

The Court, under the circumstances, refused to enforce the order by the issue of a writ of attachment.

APPLICATION for an attachment for disobedience to an order to secure the wife's costs.

This was a petition by the husband for dissolution of the marriage on the ground of the wife's adultery, and the wife in her answer denied the charge, and made a counter-charge against her husband.

On March 17, 1891, an order was made on the petitioner, directing him within seven days from the service of the order, to pay into the Registry, or to secure by a bond with two sureties, the sum of 135*l.*, to cover the respondent's costs of the hearing of the cause. On April 14, when search was made in the Registry, the petitioner had neither paid the amount ordered nor had given security for it, but he had filed an affidavit to the effect that he was wholly unable to comply with the order, his only means of livelihood being obtained from his employment as a joiner, and that he had to maintain and educate three children of the marriage, besides paying eight shillings a week alimony to his wife.

R. H. Pritchard, for the respondent, moved for the issue of a writ of attachment against the petitioner to enforce compliance with the order of the Court.

B. Deane, for the petitioner. This is not a case for an attachment. There is no precedent for the issue of a writ of attachment against a petitioner. The proper course if he fails to comply with the order to give security for the respondent's costs is to move to dismiss the petition.

R. H. Pritchard, in reply. The respondent has made counter-

charges, and is entitled to have them heard. Whenever there are counter-charges made the order to secure the respondent's costs has always been enforced. [He referred to *Bates* v. *Bates*. (1)]

JEUNE, J. It seems to me impossible to make an order in this case. If the wife had been the petitioner *Bates* v. *Bates* (1) would have applied, and as the husband swears that he has no means, it would have been for the Court to inquire into the special circumstances of the case, whether the husband's default arose from mere wilfulness on his part or from inability. *Bates* v. *Bates* (1) is not in point, because here it is the petitioner against whom the attachment is asked. If the petitioner does not comply with the order to secure the respondent's costs, the result is that the proceedings are stayed. I do not think that the condition is changed because there is a counter-charge. The wife can commence a suit of her own, and can make another application to have her costs secured. She being in that case the petitioner would be entitled to have any order enforced which she obtained. As the case stands now no order can be made on this application.

Solicitors for petitioner: *Maude & Tunnicliffe.*
Solicitors for repondent: *Chesters.*

W. L.

MOORE (FALSELY CALLED BULL) *v.* BULL.

April 28

*Nullity of Marriage—Colonial Decree—Variation of Settlements—Jurisdiction of the Court—*20 *&* 21 *Vict. c.* 85, *s.* 45—22 *&* 23 *Vict. c.* 61, *s.* 5.

A decree of nullity of marriage having been made by a colonial court, a petition was presented to the High Court for variation of settlements, the parties having returned to this country:—

Held, that there was no jurisdiction to entertain the application.

APPLICATION for variation of settlements.

The petitioner in this case, Harriet Jane Moore, and the respondent, Willis James Bull, went through a form of marriage in this country in January, 1884. They afterwards went to reside in New Zealand, and on June 28, 1890, the Supreme Court of

(1) 14 P. D. 17.

1891

MOORE v. BULL

Justice at Wellington, on a petition presented by Miss Moore, pronounced the marriage to be null and void.

It appeared that in December, 1883, a settlement was executed in contemplation of the marriage of a sum of between 2000*l.* and 3000*l.*, to which the petitioner was entitled, on the usual trusts, with a life interest to the wife and a reversionary interest to the husband for his life, the fund to be divided among the children of the marriage (if any) after the death of the parents, and failing children to pass to the next of kin of the petitioner. The respondent brought nothing into settlement. The Colonial Court, at the time of pronouncing the decree of nullity was not asked to deal with the settlements, but both parties had since the decree returned to this country, and the petitioner now applied for leave to file a petition in this Court for variation of settlements. The respondent did not oppose the motion, and the trustees intimated their willingness to take the directions of the Court.

Sim, for all the parties, in support of the motion. There is no precise authority on the point; but there is nothing to prevent the Court from exercising its jurisdiction under the present circumstances. The first Divorce Act (20 & 21 Vict. c. 85), s. 45, restricted the power of the Court in dealing with property to any case in which the Court shall pronounce a sentence of divorce or judicial separation. This provision did not enable the Court to vary settlements, and the Act 22 & 23 Vict. c. 61, s. 5, which extended the power of the Court to the variation of settlements was in these terms: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or their respective parents as to the Court shall seem fit." The words of the section shew that it is not necessary that the decree should have been pronounced by this Court.

[JEUNE, J. The difficulty presented by this case is this, that

the Court would not be able to apply its powers under s. 45 of 20 & 21 Vict. c. 85, but would only be able to deal with the case under the 5th section of 22 & 23 Vict. c. 61. The former Act is not incorporated with the later one?]

No, but they must be deemed to be incorporated, as otherwise the effect would be to restrict the powers of the Court. The Court is entitled to deal with the matter in the same way as the Courts of Chancery and Common Law give an auxiliary sanction to foreign judgments. This Court recognises foreign probates and decrees of divorce when not contrary to the law of this country. [He cited Piggott on Foreign Judgments, page 191, *Laneuville* v. *Anderson* (1) and *Enohin* v. *Wylie* (2).]

JEUNE, J. This is certainly a novel application. There was a decree of nullity of marriage pronounced at the instance of the wife by the Court of New Zealand, which I will assume to have been competent to pronounce such a decree, and no doubt it would be desirable under the circumstances if the parties having obtained that decree could come here—especially as they are all agreed—and get a variation of settlements without having to institute proceedings in the colony. The whole matter is governed by statute, and it is from the statute alone that this Court has power to deal with settlements. There are two sections to be referred to. The first is s. 45 of 20 & 21 Vict. 85, which says that "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall appear to the Court that the wife is entitled to any property either in possession or reversion," it may order a settlement to be made. That Act was found not to be sufficient, and the 22 & 23 Vict. c. 61, was passed to supplement it, and by s. 5 it is provided that "the Court after a final decree of nullity or dissolution of marriage" may inquire into the existence of settlements and may make orders with reference to the application of the whole or a part of the property settled. Now, can it possibly be said that although one section gives power to this Court only when it has itself pronounced a certain sentence, the other section gives power to this Court to make orders with

(1) 30 L. J. (P. & M.) 25. (2) 31 L. J. (Ch.) 402.

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MOORE v. BULL.

Jeune, J.

respect to the application of property settled, not only when it has itself pronounced a decree, but also when other Courts in other countries have done the same thing. It seems to me impossible to suppose that the legislature intended that the Court should act under the later section in cases where foreign decrees had been pronounced, but not in the cases contemplated under the first section. Therefore, I feel bound to hold that under s. 5 of the 22 & 23 Vict. c. 61 it is only after this Court has itself pronounced a final decree that inquiry can be made into the existence of settlements with a view to their variation. Not only can no authority be quoted to me in support of this application, but it appears to me that it is contrary to the principle of the thing. Of course, in certain cases our Courts act on foreign judgments—that is to say, that where foreign judgments have been pronounced international comity recognises them, and we refuse to go behind them. In the same way this Court, exercising its own power, will have regard to the proceedings of foreign courts, and will lend what is called auxiliary sanction to their decrees. But that is a very different thing from that which I am asked to do, which is to take the proceeding of a foreign court and exercise a jurisdiction with regard to it which in my view can only be exercised where the foundation of it is a decree of this Court. This application therefore must be dismissed.

Application dismissed.

Solicitors: *Lake, Beaumont, & Lake.*

W. L.

TAPLEN *v.* TAPLEN AND COWEN (THE QUEEN'S PROCTOR INTERVENING).

1891
May 4.

Divorce—Queen's Proctor, Intervention by—Decree Nisi rescinded—Costs against Co-Respondent—23 & 24 Vict. c. 144, *s.* 7; 41 *Vict. c.* 19, *s.* 2.

A husband having obtained a decree nisi in a petition for divorce, on the ground of his wife's adultery, the Queen's Proctor intervened, and charged that the decree had been procured by the collusion of the respondent and co-respondent. The co-respondent was cited, but did not appear. At the hearing, the Court having found the issues in favour of the Queen's Proctor, condemned the co-respondent in costs.

THIS was originally a petition by the husband, praying for a dissolution of the marriage on the ground of his wife's adultery, and a decree nisi was pronounced in February, 1890.

The Queen's Proctor subsequently intervened in the suit, and charged the respondent and co-respondent with collusion and conspiracy. The petitioner appeared and filed a plea denying the Queen's Proctor's allegation; but the co-respondent, who had been served with a citation, did not appear.

The case was heard before Collins, J., without a jury.

Inderwick, Q.C., Marshall Hall and *G. Stephenson* with him, for the Queen's Proctor.

The petitioner appeared in person.

The Court found all the issues in favour of the Queen's Proctor, rescinded the decree nisi, dismissed the petition, and condemned the respondent in costs.

Inderwick, Q.C., applied that the co-respondent should also be condemned in costs.

[COLLINS, J. In *Blackhall* v. *Blackhall* (1) the Court refused to condemn the co-respondent in costs, on the ground that he was not a party to the proceedings.]

In the present case the co-respondent is a party to the proceedings, for he has been cited, though he has not chosen to appear. His conduct has compelled the intervention of the Queen's Proctor. In the case cited there was no charge against the co-respondent, and he had been dismissed from the suit. It was the petitioner and the respondent whom the Queen's Proctor

(1) 13 P. D. 94.

1891

TAPLEN v. TAPLEN.

charged with collusion, and he failed to make good his charge. Sect. 7 of 23 & 24 Vict. c. 144, and s. 2 of 41 Vict. c. 19, give the Court full power to deal with the costs, and to condemn any of the parties in costs.

COLLINS, J. It seems to me that when one comes to look at the language of s. 7 of 23 & 24 Vict. c. 144, followed up as it is by the 2nd section of 41 Vict. c. 19, it is quite clear that the Court has, as it ought to have, power to deal with the question of costs as against the co-respondent, as well as against the respondent. The first of these sections says that after trial it shall be lawful for the Court to order the costs of such counsel, witnesses, or otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including the wife, if she have separate property. That, I take it, clearly gives power to the Court to make the co-respondent, as one of the parties, pay the costs. But it does not stop there. Sect. 2 of the 41 Vict. c. 19, enables the Court to make such order as to the costs of the Queen's Proctor, or of any other person who has intervened, which have been caused by such intervention, as may seem just. The case of *Blackhall* v. *Blackhall* (1) is not in point. The ruling must be read in the light of the circumstances of the case, and the point before the Court at the time. The petitioner had claimed a divorce; the respondent and co-respondent had pleaded connivance; the Queen's Proctor intervened in the interest of the co-respondent to establish connivance between the petitioner and respondent. The co-respondent was not made a party, and Butt, J., did not think he could treat him as a party against whom he could make an order. In this case the Queen's Proctor has intervened, and has charged collusion between the petitioner and the co-respondent. He has made the co-respondent a party. He is a party, and I have ample power to deal with him as a party. I have, therefore, no hesitation in condemning the co-respondent, as well as the petitioner, in costs.

For the Queen's Proctor: *Sir A. K. Stephenson.*

The petitioner in person.

W. L.

(1) 13 P. D. 94.

IN THE GOODS OF P. A. FRASER.

1891
April 14.

Probate—Two Wills—Separate Disposition of Property in England and Scotland—Debts charged on one Estate only—Grant.

A testator executed two testamentary papers, one disposing exclusively of property in Scotland, the other dealing solely with property in England. By the Scotch testamentary paper all the testator's debts were charged on the Scotch estate. Two of the executors of the English will were trustees of the Scotch estate. The Court being satisfied that no creditor would be prejudiced, made a grant of probate of the English will alone, without requiring the Scotch deed to be incorporated, upon condition that a certified copy of such deed was filed, and a note to that effect made on the probate.

APPLICATION for probate.

Patrick Allan Fraser, late of Arbroath House, N. B., and Hawkesbury Hall, in the county of Warwick, died September 16, 1890. On August 2, 1873, he executed a deed of settlement and mortification which, with two codicils dated August 13, 1873, and October 16, 1874, was duly registered in the Court of Session. These documents disposed of all the testator's real and personal estate situate in Scotland, and they directed the payment thereout of all just and lawful debts and expenses. On February 24, 1886, the testator made a will, and on May 26, 1887, he made a codicil to it—disposing of his English property—and neither document contained any reference to the payment of debts.

B. Deane, moved for probate of the English will without requiring the incorporation of the Scotch will. The case would be precisely similar to *In the Goods of Astor* (1), but for the circumstance that all the debts are payable out of the Scotch estate.

[JEUNE, J. *In the Goods of Astor* (1) does not go so far as this, and as there is an estate of 500,000*l.*, I do not see that there is any necessity for consulting considerations of expense. But will any creditor be prejudiced?]

Two of the executors of the English will are trustees of the Scotch will, so that there will be no difficulty in safeguarding the creditors, if there are any. It is a mere question of

(1) 1 P. D. 150.

1891

IN THE GOODS OF P. A. FRASER.

marshalling the assets. The English executors will be bound, under any circumstances, to pay the English debts.

JEUNE, J. The circumstances of this case are peculiar. Here is a Scotch estate and a Scotch deed disposing of it, by which all debts are charged on the Scotch property, and an English estate left to English executors. Each is distinct from the other, with the exception that all the debts are charged on the Scotch property. But as it appears that no creditor can be prejudiced, I am prepared to follow *In the Goods of Astor* (1), and to grant probate of the English will alone, without requiring the Scotch will to be incorporated, but with a note on the probate that an exemplification of the Scotch deed has been filed.

Solicitor: *Frith Needham.*

W. L.

C. A.

1891

April 15.

[IN THE COURT OF APPEAL.]

O'SHEA *v.* WOOD.

Probate—Production of Documents—Documents belonging to Solicitor—Order XXXVII., *rr.* 5, 7—*Privileged Communications.*

The defendants in an action by the plaintiff propounding a will, having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, banker's cash-books containing entries and memoranda relating to the deceased and her affairs, which documents were the private property of the solicitor:—

Held, affirming the decision of Jeune, J., that an order could not be made on the plaintiff to produce them for inspection:

Held, also, affirming the decision of Jeune, J., that the solicitor could not be compelled under Order XXXVII., r. 7, to produce these documents for the purpose of discovery, nor be called for examination at this stage of the proceedings under Order XXXVII., r. 5:

Held (reversing the order of Jeune, J.), that an affidavit by which a party objected to produce documents because she claimed them "to be privileged, as communications between herself and her solicitor," was insufficient to protect them, it being necessary to shew that the letters were professional communications of a confidential character.

THIS was an appeal by the defendants from a decision of Jeune, J. (2), and also from a subsequent order made in cham-

(1) 1 P. D. 150. (2) Ante, p. 237.

bers on March 7, 1891, refusing an application by the defendants that Mr. Pym, the plaintiff's solicitor, should produce for inspection the documents which it was asked that the plaintiff should produce, and that Mr. Pym should be examined before a special examiner, so that the documents might be produced, and that the plaintiff might be ordered to produce certain documents which she claimed to have protected as privileged.

By her affidavit of documents the plaintiff admitted possession of the documents set forth in the first and second parts of the first schedule thereto, and objected to produce the documents in the second part of the schedule, "on the ground that they are privileged, as set out in the said second part of the said first schedule hereto." In the second part of the first schedule was contained this passage: "The following letters and telegrams which plaintiff claims to be privileged as communications between herself and her solicitor" (here followed a long list of letters and telegrams). The close of the second part was as follows: "A bundle marked C, containing 121 original letters and telegrams from the plaintiff to her solicitors, Messrs. Tathams & Pym, dated from February 16, 1888, to May 20, 1889, inclusive, and numbered 1 to 121 inclusive, which plaintiff claims to be privileged as communications from herself to her solicitor."

1891. April 15. *Bayford, Q.C.*, and *Barnard*, for the defendants. The documents in the possession of the plaintiff's solicitor relating to the affairs of the testatrix ought to be produced for inspection.

[KAY, L.J. Can you find any case in which a party has been ordered to produce documents which are the private property of his solicitor?

LINDLEY, L.J. We are all quite clear against you on this point.]

Then as to the order asked against the solicitor, such an application is warranted by Order XXXVII., r. 5.

[BOWEN, L.J. *Warner* v. *Mosses* (1) is against your right to such an order.]

Rule 7 will cover the case. *Elder* v. *Carter* (2) is not decisive

(1) 16 Ch. D. 100. (2) 25 Q. B. D. 194.

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against the defendants, for there the person against whom the order was asked was an entire stranger to the proceedings.

[KAY, L.J. The solicitor is not a party, and so is a stranger to the proceedings.]

Then as to the documents for which privilege is claimed, it is not sufficiently claimed. The mere fact that the letters passed between the party and her solicitor, does not make them privileged; it is necessary to shew that they were communications of a confidential character: *Gardner* v. *Irvin.* (1)

R. T. Reid, Q.C., and *Searle*, for the plaintiff, were not called upon, except as to the documents for which privilege was claimed, and as to them they asked leave to make a further affidavit.

LINDLEY, L.J. This is an appeal from Jeune, J., and relates to two classes of documents. Its first object is to obtain production of certain documents and entries which are not in the possession, custody, or power of the plaintiff, but which she is informed and believes are in the possession of her solicitor, and are his property. She was quite right in omitting them in her first affidavit of documents. Afterwards a further affidavit was made which disclosed their existence; but the result of the evidence is that they are the property of the solicitor. It is quite clear, then, that the plaintiff cannot be ordered to produce them; and as against the solicitor, what right have the defendants to see them now on an application of this kind? None. The solicitor might be called upon to produce them at the trial under a subpœna duces tecum; but it has been decided by the Court of Appeal in *Elder* v. *Carter* (2), that wide as are the terms of Order XXXVII., r. 7, they were not intended to give litigants any new right to discovery against persons not parties to the proceedings. As against Mr. Pym, the solicitor, the appeal must be dismissed with costs.

The other class of documents consists of papers for which the plaintiff claims privilege. They were properly scheduled by her in the second part of the first schedule to her affidavit of documents, and in admitting possession of them, she objects to produce them, "on the ground that they are privileged, as set out in the

(1) 4 Ex. D. 49. (2) 25 Q. B. D. 194.

said second part of the said first schedule hereto." In the second part of the first schedule, she claims them to be "privileged, as communications between herself and her solicitor." Jeune, J., refused production, without directing her to make any further affidavit. In this we think he went wrong. The law as to the privilege of communications between solicitor and client is now well understood, and is very clearly expressed in *Gardner* v. *Irvin*. (1) "It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor; the letters must be professional communications of a confidential character for the purpose of getting legal advice." Letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged, there must be a professional element in the correspondence. I do not find in this affidavit any statement that such is the case here. I agree with the observation of Cotton, L.J., that an affidavit which cannot be contradicted ought to be precise and full. The defendants have on this point good ground for appeal, and the plaintiff cannot avoid production unless she makes a further affidavit.

The appeal will be dismissed with costs as against Mr. Pym, but we make no order as to the costs of the parties.

BOWEN, L.J. I am of the same opinion.

KAY, L.J. I agree, and will only add a few words as to the question of privilege. The law as to privilege for communications between a client and his solicitor has been gradually developed. The rule used to be that, in order to establish privilege, you must shew either that the letters passed after the dispute which led to the litigation had arisen and with reference thereto, or that the solicitor's letters contained legal advice or opinions. This was found very inconvenient, and the rule gradually developed into that expressed by the words cited by Lindley, L.J., from the judgment of Cotton, L.J., in *Gardner* v. *Irvin*. (1) I think those words express the rule more accurately than the words of Kindersley, V.C., cited by Lord Selborne in *Minet* v. *Morgan* (2):

(1) 4 Ex. D. 49. (2) Law Rep. 8 Ch. 361, 368.

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"It is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual, or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity." Letters containing mere statements of fact are not privileged; they must be of a professional and confidential character. The affidavit in the present case does not allege enough to shew that the correspondence is privileged.

Appeal (except as above mentioned) dismissed.

Solicitors: *Western & Son; Tathams & Pym.*

H. C. J.

May 12.

WHITE *v.* DUVERNAY.

Probate—Defendant a Minor residing out of Jurisdiction—Refusal to enter an Appearance—Official Solicitor nominated Guardian ad litem—Contentious Rules of Probate Court, 1862, *r.* 74—*Rules of Supreme Court,* 1883, *Order* XIII., *r.* 1—*Practice.*

The defendant in a probate action was a minor resident out of the jurisdiction. Notice of the writ had been served upon her, and upon her guardian nominated by the foreign Court, but no appearance had been entered on her behalf, and it appeared that her guardian declined to enter an appearance.

The Court, holding that the practice was governed by Order XIII., r. 1, and not by rule 74 of the Contentious Rules of the Probate Court, 1862, nominated the official solicitor of the Court to be the defendant's guardian ad litem, and ordered that his costs should be part of the costs of the plaintiff who was the executor propounding the will.

APPLICATION for the appointment of a guardian ad litem.

George Ludwig Duvernay, deceased, died December 5, 1890, leaving a will duly executed, bearing date August 28, 1890, by which he appointed the plaintiff in the suit his sole executor. The defendant, Emy Duvernay, the niece and sole next of kin of the deceased, was a minor, residing at Frankfort-on-the-Main.

The plaintiff propounded the will, and on January 13, 1891, notice of the writ was duly served on the defendant at No. 6, Guillotstrasse, Frankfort, and on Dr. Edward Enyim, who had been appointed her guardian by the German Court.

No appearance was entered on behalf of the defendant, and it

appeared that, after some correspondence between the plaintiff and defendant's guardian, the plaintiff was referred to a firm of solicitors in London, with whom he had several interviews; but in the end they informed him that the defendant and her guardian declined to enter an appearance to the action.

The plaintiff then applied in the Registry that the official solicitor to the Court might be appointed the defendant's guardian ad litem, and notice of the application was duly served on the defendant and her guardian on April 29, 1891. The Registrar, however, refused to make the order, and

Searle, renewed the application before Jeune, J., in chambers. The doubt entertained by the Registrar was whether the practice was governed by rule 74 of the Contentious Rules of 1862, or by Order XIII., r. 1 of the Rules of the Supreme Court, 1883, and the case of *King* v. *Hornby* (1), decided in chambers by Butt, J., in April, 1885, was referred to as raising such a doubt. It is submitted that the effect of ss. 16 and 23 of the Judicature Act of 1873, 36 & 37 Vict. c. 66, is to make Order XIII., r. 1, applicable. The old rule is to the effect that a minor may elect a guardian, but here the minor has refused to elect a guardian, and will have nothing to do with the proceeding.

JEUNE, J., held that the practice was governed by the Judicature Rules of 1883, and made an order that the official solicitor should be appointed the defendant's solicitor ad litem, his costs to be provided for by the plaintiff as part of the plaintiff's costs.

Solicitor: *W. Newby Cradwell.*

(1) Not reported.

W. L.

1891 IN THE GOODS OF DICKINSON.

April 7. *Administration—Joint Grant—Widow and two elder Sons—Consent of Minor.*

A man who died intestate left a testamentary paper which he had signed, but which was not duly executed, in which he expressed a wish that his property should be divided equally between his wife and his five children, and that his business should be carried on by his wife and his two elder sons, whom he appointed his executors. All the children were of full age except the youngest, who was twenty years and six months old, and all the persons interested were desirous that a joint grant of administration should be made to the widow and the two elder sons:—

Held, that there were special circumstances to justify the Court in making a joint grant as prayed.

APPLICATION for administration.

William Dickinson, late of Barton, in the county of Northumberland, died February 24, 1891, leaving a widow and six children surviving him. Five of the children were of age, and the youngest was twenty years and six months old. The deceased died intestate; but he left a testamentary paper which he had signed, but which was not duly executed, whereby he expressed his wish that his wife and children should take the whole of his property equally and that his business should be carried on by his wife and his two eldest sons, W. B. Dickinson and H. M. Dickinson, who should act as his executors.

Application was made in the Registry with the consent of all persons interested for a joint grant of administration to the widow and the two eldest sons, but it was refused on the grounds that such grants were unusual, and also that in any event it could not be made in this case even by consent, as one of the next of kin was a minor.

Searle moved for a joint grant as before mentioned. In the case relied on in the Registry, *In the Goods of Newbold* (1), two of the next of kin were infants of nine and eleven years of age, and Lord Penzance declined to make a joint grant because some of the next of kin were too young to be able to give consent. But in this case all the next of kin are of full age with the exception

(1) Law Rep. 1 P. & D. 285.

of one, who is within six months of being of age. A joint grant is in accordance with the wish expressed in the informal testamentary paper signed by the deceased, and all the parties interested are desirous that it should be made.

JEUNE, J. Considering how near the only infant in the case is to being of full age, and considering the special circumstances of the case, I think I am justified in granting your application for a joint grant.

Application granted.

Solicitors: *Williamson, Hill & Co.*

W. L.

IN THE GOODS OF MARY E. MANN.

May 12.

Administration—Foreign Will disposing of Property Abroad—Intestacy as to English Estate—Grant.

The deceased left a will expressly limited to her property abroad, which was proved by the executors in the foreign Court; but she died intestate as to her property in this country:—

Held, that administration of the property in this country might be granted to her sole next of kin.

APPLICATION for administration.

Mary E. Mann, late of Warren Drive, New Brighton, in the county of Cheshire, a widow, died December 24, 1890, leaving Mary Margaret Mann, her natural and lawful daughter, her only child, and next of kin. She died intestate as to her property in England; but she had property in the United States, with respect to which she had made a will, expressly limited by its terms in its operation, to such property as she possessed situate and invested in the United States of America.

She appointed two gentlemen resident in Baltimore and Philadelphia, executors of her will, and they proved it in the district register office at Philadelphia.

Searle, moved for a grant of administration to the daughter and sole next of kin of so much of the deceased's estate as was situate in this country and not dealt with by the will. There is no case reported exactly similar to this, but the Court has often admitted

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IN THE GOODS OF MARY E. MANN.

a will to probate, disposing of estate in this country where there has been another will disposing of property abroad. *In the Goods of Astor.* (1) The executors assent to this motion.

JEUNE, J. I think your application may be granted. It is laid down by Godolphin, in his Orphan's Legacy, or a Testamentary Abridgment, p. 231, that "a man dying possessed of goods in two provinces and making his will of the goods only in one of them, and dying intestate as to the goods in the other province, administration may be granted as to the goods of that province whereof he died intestate." I think the analogy is sufficient for me to follow, and I make the grant.

Solicitors: *Wynne, Holme & Wynne.*

W. L.

June 29.

[DIVISIONAL COURT.]

THE HERO.

Admiralty—County Court—Admiralty Jurisdiction—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 21, *sub-ss.* (1) (2)—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 74.

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21: "Proceedings in an Admiralty cause shall be commenced: (1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings. (2.) If the foregoing rule be not applicable then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates . . . resides."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant . . . shall dwell or carry on his business at the time of commencing the action or matter."

The plaintiffs, owners of a steamship, brought an action, in personam, on the Admiralty side of the county court within the district of which the defendants, charterers of the vessel, and consignees of the cargo, carried on their business, for damages for the detention of the vessel in unloading. The county court judge dismissed the action for want of jurisdiction, on the ground that, as the ship was not at the time of the commencement of the proceedings within the district, nor did the plaintiffs reside there, neither sub-s. (1) nor sub-s. (2) of

(1) 1 P. D. 150.

s. 21 of the County Courts Admiralty Jurisdiction Act, 1868, had been complied with. On appeal:—

Held, that the county court had jurisdiction, as the language of s. 74 of the County Courts Act, 1888, was general in its terms, and therefore included defendants in an Admiralty action who, at the time of commencing the action, carried on their business within the district.

APPEAL by plaintiffs from an order of the judge of the county court of Glamorganshire holden at Cardiff, dismissing their action for want of jurisdiction.

The material facts were:—

On December 29, 1890, an action, in personam, for 66*l.* 6*s.* 8*d.* damages for four days' detention, in the nature of demurrage, was commenced, on the Admiralty side of the above mentioned county court, by the plaintiffs, the Bristol Steam Navigation Company, Limited, with registered offices at Bristol, and the owners of the steamship *Hero*, against the defendants Messrs. Watsons, timber merchants of Cardiff, who were the charterers of the vessel for the carriage of a cargo of timber from Uleaborg to Cardiff, the discharge of which cargo by the defendants, as consignees, it was alleged, had occupied an unreasonable time, contrary to a clause in the charterparty stipulating for "the customary steamer despatch of the port."

The defendants filed particulars of a counter-claim for 16*l.* 4*s.* damage to timber and detention of lighters.

On January 16, 1891, the claim, and counter-claim, came on for trial, but the defendants withdrew their counter-claim, and it appearing on the cross-examination of one of the plaintiffs' witnesses that the *Hero* was not within the district of the county court at the commencement of the proceedings, and that the plaintiffs did not reside within the jurisdiction, the learned judge, on the application of the defendants, and on the ground that the case did not fall within sub-s. (1) or sub-s. (2) of s. 21 of the County Courts Admiralty Jurisdiction Act, 1868 (1), dismissed the action for want of jurisdiction.

(1) 31 & 32 Vict. c. 71, s. 21: "Proceedings in an Admiralty cause shall be commenced—

"(1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings.

"(2.) If the foregoing rule be not applicable, then in the county court having Admiralty jurisdiction in the district of which the owner of the

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Abel Thomas, for the appellants, the plaintiffs in the court below. The jurisdiction to try this action in a county court arises under s. 2, sub-s. (1), of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (1), by which the Admiralty jurisdiction was extended to a claim of this nature, and as this Act is by s. 1 to be read as one Act with the County Courts Admiralty Jurisdiction Act, 1868, the latter Act must be looked at to ascertain what county court has jurisdiction. By s. 21, sub-s. (2) of the Act of 1868 proceedings in an Admiralty cause shall be commenced in the county court having Admiralty jurisdiction in the district of which the owner of the property to which the cause relates resides, and the word "property" will apply to the cargo of timber landed from the *Hero* and which was the property of the defendants who were timber merchants residing within the district in question.

[THE PRESIDENT. That does not follow, for the defendants might have sold the timber.]

If the Acts conferring Admiralty jurisdiction on county courts will not cover the case, then the plaintiffs rely upon s. 74 of the County Courts Act, 1888 (2), as being general in its terms, and therefore including an Admiralty action commenced in the county court within the district of which the defendants carry on their business. This latter Act is intended to include Admiralty matters, as by s. 125 (3) there is special provision made for the

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vessel or property to which the cause relates . . . resides."

(1) 32 & 33 Vict. c. 51, s. 2: "Any county court appointed, or to be appointed, to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes—

"(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship . . . provided the amount claimed does not exceed three hundred pounds."

(2) 51 & 52 Vict. c. 43, s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant . . . shall dwell or carry on his business at the time of commencing the action or matter . . ."

(3) 51 & 52 Vict. c. 43, s. 125: "Where an Admiralty action has been heard in the Court with the assistance of nautical assessors, Elder Brethren of the Trinity House shall be summoned to assist, on the hearing of an appeal by the High Court, if either party shall require the same, and the High Court shall be of opinion that the assistance of the Elder Brethren is necessary or desirable."

attendance of Trinity masters as nautical assessors, on the hearing of Admiralty appeals from a county court.

L. E. Pyke, for the respondents, the defendants in the Court below. As the amount of the plaintiffs' claim is in excess of the common law jurisdiction of the county court, this action can only be tried in a county court having Admiralty jurisdiction, and the plaintiffs failed to satisfy the learned county court judge that he could, under the County Courts Admiralty Jurisdiction Acts of 1868 and 1869, proceed to hear this case on the Admiralty side of his Court. The point that s. 74 of the County Courts Act, 1888, includes such a case as this was not taken in the Court below, and the whole tenor of that Act shews that it is only intended to consolidate and amend the County Court Acts relating to the Common Law and Equity sides of the Court. The Act does not affect to deal with the special procedure and jurisdiction conferred on certain county courts in Admiralty. Acts of a general nature do not repeal Acts of a special nature; and if it had been intended that a permissive section like s. 74 should apply to the Admiralty side of a county court, and override the positive enactments of s. 21 of the Act of 1868, it would have been so stated, and in the schedule containing a list of the Acts, and portions of Acts, repealed, there would have been a reference to the section last mentioned, but there is no indication that the jurisdiction in Admiralty is intended to be modified or extended. The provisions of s. 125 of the Act of 1888, as to the attendance of the Trinity Brethren have nothing to do with the Admiralty jurisdiction of county courts, as these provisions relate to this Court when sitting as a Court of Appeal from county courts, and the section in question only embodies s. 11 of the County Courts Act, 1875, in order that the whole of the latter Act might be repealed, which otherwise could not have been done.

THE PRESIDENT (SIR CHARLES BUTT). I am disposed to think that the Admiralty jurisdiction was very little present to the mind of the legislature in passing the County Courts Act, 1888, and I can quite understand the argument that that Act never was intended to apply to the Admiralty jurisdiction of the county

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THE HERO.

The President.

courts; but there are one or two sections which shew at all events, that those who had a hand in passing this Act, were aware of the Admiralty jurisdiction in county courts and, being aware of that, they use perfectly plain language in s. 74, to the effect that every person having an action or claim may pursue it in the Court within the jurisdiction of which the defendant resides. That being so, I am at a loss to see how we can possibly say that the plaintiffs have no right to proceed in the County Court at Cardiff where the defendants reside. We cannot say that the right which appears to be given in very plain words, is not to be used because there is something in one or two of the earlier County Court Acts which, it is suggested, does not agree with it. I am of opinion, therefore, that under s. 74 of the Act of 1888, the learned judge in the Court below ought to have proceeded to hear, and adjudicate upon, this claim.

JEUNE, J. I am of the same opinion. Primâ facie, where you have general words in an Act of Parliament, they ought to be interpreted in the sense which their construction apparently bears, subject to this, that there may be in the Act other expressions which are inconsistent with that, or from which an inference is to be drawn that, though the language is general in its terms, it is not intended to have so wide an application. I was anxious to hear if there was anything to be found in the Act of 1888 which would have been inconsistent with extending the operation of s. 74 to Admiralty proceedings. Nothing of the kind has been pointed out, and I cannot see why general sections of the Act of 1888 are not to apply to all branches of county court jurisdiction.

Order appealed from set aside with costs.

Solicitors for plaintiffs: *Downing, Holman & Co., agents for Downing & Handcock, Cardiff.*

Solicitors for defendants: *Ingledew, Ince, & Vachell, Cardiff.*

T. L. M.

1891
June 2.

In the Goods of SARAH MOORE.

Administration—Grant to a Son, passing over the Husband.

Where the husband of an intestate had been cited to take out letters of administration to the personal estate and effects of his wife and had entered no appearance to the citation, the Court passed him over and made a grant of administration to the only son of the intestate.

Sarah Moore, late of Birmingham, in the county of Warwick, deceased, died November 1, 1890, intestate, leaving her husband William Moore and William Warrilow, her natural and lawful son, her only next of kin.

William Moore, the husband, did not apply for letters of administration to the personal estate of the deceased; and on March 6, 1891, William Warrilow, the son, extracted a citation under the seal of the Court, calling on William Moore to accept or refuse letters of administration, or to shew cause why they should not be granted to him as the natural and lawful son and next of kin of the deceased. The citation was personally served on William Moore on April 23, 1891, and there was an affidavit that, search having been made in the registry on May 21, 1891, no appearance was found to have been entered on behalf of William Moore.

B. Deane, moved that letters of administration of the personal estate and effects of the deceased Sarah Moore be granted to her son, passing over the husband.

The Court made the grant as prayed.

Solicitors: *Goldberg & Langdon.*

W. L.

1891
June 9.

IN THE GOODS OF JUPP.

Administration—Will—Residuary Bequest—"All other effects"—Grant.

A testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease." The will went on to make specific bequests to his wife of money, shares, securities, &c.; and it directed her to pay his debts, and it left it to her discretion whether she would provide for his son and daughters by a previous marriage and a nephew. It contained no bequests to any other person:—

Held, that the words "all other effects" constituted his wife residuary legatee.

APPLICATION for grant of administration with will annexed.

Henry Robert Jupp, late of 58, Stanhope Street, Strand, in the county of Middlesex, deceased, died April 22, 1891, leaving a duly executed will bearing date March 28, 1891, by which he appointed his wife, Mary Jupp, his sole executrix.

Mary Jupp survived her husband, and died April 29, 1891, without proving his will. She left a will duly executed, bearing date April 25, 1891, by which she appointed Matthew Henry Embley and Walter Gray her executors.

The will of Henry Robert Jupp was in the following words: "I give, devise, and bequeath unto my dearly beloved wife all my jewellery, furniture, pictures, wearing apparel, and other effects belonging to me at the time of my decease; also all my share of the business of licensed victualler carried on at the Old George, Clare Market. I also give to my wife all my interest in the money invested in our joint names in Meux & Co.'s Brewery, Limited; also my third share in the money invested in the Union Loan Discount Office; also the sum of 220*l.* due to me in the Metropolitan Typographical Widow and Orphan Fund; also the sum of 12*l.* 10*s.* due to me on my policy in the Prudential Life Company; also my share in all moneys deposited in the joint names of myself and my said wife in the Birkbeck Society; also the moneys deposited by me in the Old Ford Starr-Bowkett Building Society, &c. I desire my said wife, out of the above funds, to discharge my just debts and funeral and testamentary expenses; and I declare that I leave it entirely in the discretion of my said wife whether she will provide for my son and daughters

by my former wife and for my nephew; and I appoint my dear wife the executrix of this my will."

Barnard, on behalf of the executors of Mrs. Jupp's will, moved for a grant of administration, with the will annexed, to the estate and effects of Mr. Jupp. Although there are subsequent bequests to the wife, the words "all other effects belonging to me at the time of my decease" are sufficient to give the wife the whole residue. The direction to pay all debts, and the fact that he left it to his wife's discretion whether she would provide for his next of kin, shews that he did not intend them to take any part of his property under the will.

[He referred to *In the Goods of Sarah Shepheard* (1) and *Fleming* v. *Burrows*. (2)]

JEUNE, J. I think this case a stronger one than those mentioned. Here you have clear words, "all other effects," and they are not cut down by any principle of ejusdem generis, nor by any specific bequests to other persons. They must be taken, therefore, in their full sense. So this case is covered by those cited; and in addition you have a provision charging the debts which the husband left on the wife, and a provision leaving it to her generosity to provide for the persons who, if he had not disposed of the residue, would have been entitled to it. It is clear that the residue was intended to pass to the wife, and I make the grant as prayed.

Solicitor: *Joseph Pearce.*

(1) 48 L. J. (P. & M.) 62. (2) 1 Russ. 276.

W. L.

BENGAL SECRETARIAT LIBRARY.

C. A.
1891
May 13;
June 16.

[IN THE COURT OF APPEAL.]

HALL *v.* HALL.

Divorce—Husband's Petition—Costs of Wife—Money paid into Court as security for Wife's Costs—Set-off of Costs—Lien of Solicitor.

The Court of Appeal has jurisdiction to order the husband's costs of an unsuccessful appeal by the wife in divorce proceedings to be paid out of money which he has paid into court to defray the wife's costs of the hearing; but the court will not make such order to the prejudice of the lien of the wife's solicitor unless he has so conducted himself as to justify so strong a measure.

A husband obtained a decree nisi for dissolution of marriage, and the usual order was made for payment of the costs of the wife. The wife appealed, and the appeal was dismissed with costs as frivolous. The wife thereupon applied to have money which had been paid into court by the husband as security for her costs paid out to her solicitor, whose taxed costs under the decree nisi exceeded that amount, and the husband made a cross application that his costs of the appeal might be paid out of the money in court:—

Held, that though the wife's appeal was a hopeless one, there was no ground for affirming that her solicitor acted vexatiously or oppressively in conducting it, and that he ought not to be deprived of his lien on the fund for the costs of the wife's defence.

PETITION by husband for dissolution of the marriage. Previous to the trial the husband paid into court 45*l.* as security for the wife's costs of the hearing. On March 23, 1891, a decree nisi for dissolution of marriage was pronounced by the Court with the usual order as to the wife's costs. Her costs were at once referred to the registrar for taxation, but owing to objections taken by the husband the taxation was not completed until after an appeal by her from the decree nisi had been heard.

On April 23, 1891, the Court of Appeal dismissed the appeal with costs; the judges saying that the appeal was frivolous.

The wife took out a summons to have the 45*l.* paid to her solicitors, whose costs had been taxed at a sum exceeding that amount. The husband took out a summons asking that his costs of the appeal might be paid out of the 45*l.* Jeune, J., expressed his wish that the point should be submitted to the Court of Appeal.

May 13. *Inderwick, Q.C.*, for the petitioner. The Rules of the Supreme Court do not apply to the Divorce Court, and the case

must be considered independently of them. The Divorce Act of 1857 (20 & 21 Vict. c. 85), s. 51, gives the Court full discretion as to costs. The usual course is to give the wife her costs, and if any sum has been paid into court as security for them to order it to be applied in paying them, but the court is not bound to make such an order, and where the wife has taken proceedings which are dismissed as frivolous, justice requires that the costs of those proceedings should be set-off. It is true that her solicitor has a lien, but the set-off ought to prevail against this lien. In *Clark* v. *Clark* (1) the husband's costs of meeting an improper defence of the wife were allowed to be set off.

[KAY, L.J. The cases at law are collected in Chitty's Archbold's Practice, 14th ed. p. 783, and the result is that the attorney's lien does not prevent a set-off. The same rule appears to prevail in equity: *Robarts* v. *Buèe.* (2)]

In *Butler* v. *Butler* (3) the wife lost the whole benefit of the money paid into court.

E. Symons, for the respondent. The principles of the Divorce Court as to costs are quite different from those of the other Courts. The principle as to the wife's costs of divorce proceedings is laid down in *Robertson* v. *Robertson.* (4) By the Rules and Regulations of the Divorce Court, r. 201, the wife's costs given by the decree nisi were payable at once, and according to the ordinary course they would have been taxed and paid before the appeal came on for hearing. The fact that the taxation has been delayed owing to objections taken by the husband ought to make no difference. In *Smith* v. *Smith* (5) the President dwells strongly on the interest which the wife's solicitor has in the question, as also he had done in *Flower* v. *Flower.* (6) The solicitor is not to lose his costs merely because he is unsuccessful, and that would be the result of acceding to the husband's contention. Here the judge has exercised his discretion by ordering payment of the wife's costs, and the Court of Appeal will not interfere with that discretion.

[KAY, L.J. The question of set-off was not then before him.]

(1) 4 Sw. & T. 111.
(2) 8 Ch. D. 198.
(3) 15 P. D. 126.
(4) 6 P. D. 119. 122.
(5) 7 P. D. 84, 89.
(6) Law Rep. 3 P. & D. 132.

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There is no case in which a wife's solicitor has been deprived of costs unless he has misconducted himself.

Inderwick, Q.C., in reply.

1891. June 15. The judgment of the Court (Lindley, Lopes, and Kay, L.JJ.) was delivered by

LINDLEY, L.J. The 45*l.* ordered to be paid into Court in this case was intended to enable Mrs. Hall to obtain legal assistance in the divorce proceedings instituted against her, and her solicitor naturally looked to this fund for his remuneration in conducting her defence. In the ordinary course of events he would have had his costs taxed and paid before the motion for a new trial came on for hearing, but the husband who paid the money into Court has caused the payment out to be delayed, and the money is still in Court.

The motion for a new trial was dismissed with costs, and the husband has applied for payment of his costs of the appeal out of this 45*l.* The money being still in Court, the High Court, and, on appeal, this Court, clearly has jurisdiction over the fund; but considering the purpose for which it was paid into Court, and the established rule that the Court will not deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure (see *Flower* v. *Flower* (1); *Robertson* v. *Robertson* (2); *Otway* v. *Otway* (3)), we do not think it right upon the present occasion to accede to the application of the husband. Although the motion for a new trial was not only unsuccessful, but was really hopeless, we are not prepared to draw the inference that the wife's solicitor acted oppressively or vexatiously towards the husband in acting for her on the motion she made for a new trial. The order dismissing the wife's motion with costs will stand, and the husband must be content to enforce that order in the usual way as best he can. The wife's solicitor, on the other hand, will get his costs of her unsuccessful motion from her as best he can. We do not propose to make the

(1) Law Rep. 3 P. & D. 134. (2) 6 P. D. 119.
(3) 13 P. D. 141.

husband pay the costs of this application, we simply make no order on it.

We feel the importance of discouraging frivolous appeals and motions for new trials in divorce cases, and with that view we dismissed the wife's motion with costs. We have no doubt of the power of the Appeal Court in a proper case to go further, and to order the costs of the successful husband to be paid out of money which he has paid into Court to provide his wife with funds for her defence, if those funds are still in Court, but the Court will not do that unless the solicitor has so conducted himself as to render such an order just as against him.

Solicitors: *J. B. Somerville*; *Thomas & Stewart.*

H. C. J.

April 21.

MICHELL *v.* MICHELL

Restitution of Conjugal rights—Husband's Petition—Decree—Non-compliance by Wife—Petition for Settlement of Wife's Separate Estate for Benefit of Husband—Order—Appeal—Dismissal of Petition— Costs — Matrimonial Causes Act, 1884 (47 & 48 *Vict.* c. 68), s. 3.

A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, he presented a petition under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), for a settlement of her property for the benefit of himself and the children of the marriage; when it appeared that the whole of the wife's property had been settled on the occasion of the marriage to her separate use without power of anticipation.

It was objected that there was no jurisdiction under the Act to order a settlement of the wife's property. The Court overruled the objection, but on appeal the Court of Appeal decided that there was no power to order a settlement of the property, which was subject to restraint on anticipation:—

Held, that the petition for a settlement must be dismissed; but that under the circumstances, the petitioner ought not to be ordered to pay the respondent's costs of the petition.

APPLICATION to dismiss a petition for a settlement out of the wife's separate estate under s. 3 of 47 & 48 Vict. c. 68, and to condemn the petitioner in costs.

The petitioner in this case—the husband—had obtained a decree for restitution of conjugal rights which the respondent had refused to obey. The petitioner then presented a petition for a settlement out of the wife's separate estate, and the registrar

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MICHELL v. MICHELL.

reported that the husband's income was 80*l.* and the wife's 540*l.*, derived from property settled to her separate use and without power of anticipation. Jeune, J., directed that a settlement of the wife's estate should be made under which a portion of her income should be paid to her husband, but postponed his decision as to the amount. (1)

The wife appealed against this decision, and the Court of Appeal held (2) that the Court had no power to order a settlement out of the wife's separate estate, where, as in this case, it was settled to her separate use without power of anticipation.

Bankes, for the respondent, moved that the petition should be dismissed, and the petitioner condemned in the costs.

Vesey Fitzgerald, for the petitioner. There is no precedent for giving costs to a respondent who is in contempt. The respondent has larger means and can better afford to pay the costs. The step taken by the petitioner to enforce the order of the Court was the only one which he could take under the Act.

Bankes, in reply. The Court of Appeal held that the petition was not one which ought to have been presented, and dismissed the appeal with costs.

JEUNE, J. This petition must undoubtedly be dismissed. An order was made for restitution of conjugal rights, which was disobeyed, and then the husband thought he could successfully invoke the assistance of the Act to obtain a share in the wife's income. According to the figures of the registrar's report, the husband's income was 80*l.*, and the wife had an income of 540*l.* subject to restraint on anticipation; and the husband had to support the two children of the marriage. Under these circumstances, he was advised to make an application to this Court, founded on an authority which was supposed to cover the circumstances of this case. The application was successful in the first instance; but the Court of Appeal held that the Court has no power to make an order where the wife's property is subject to restraint on anticipation. The petition therefore must be dismissed. Then comes the question of costs. It seems to me

(1) Ante, p. 166. (2) Ante, p. 208.

that this is a case in which I am entitled to exercise my discretion. It is not to be forgotten that the wife is in contempt. It was her leaving him that caused the husband to take the measures which he did take in endeavouring to obtain an order of the Court. It was her contempt which was primarily the cause of this petition being presented. Under the circumstances of the case, it appears to me that it was reasonable for the husband to come to this Court, and when I consider that the wife has a separate income, much larger than the husband's, and that he has to support the two children of the marriage, I think it is right that the parties should bear their respective costs. As to the costs of this motion, I think the wife ought to have them, as it was not open to her to get the petition dismissed with costs by summons in chambers.

Solicitors for petitioner: *Day & Cutler.*

Solicitors for respondent: *Ingram, Harrison, & Ingram.*

W. L.

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July 10.

Admiralty—Collision—Trawler—Pyrotechnic Light—Sea Collision Rules, Art. 10, *Sched. Part II.—Order in Council, June* 24, 1885.

By the Regulations for Preventing Collisions at Sea, Art. 10, Sched. Part II. (as modified by Order in Council of June 24, 1885), a British sailing trawler in the North Sea, having her trawl in the water, and carrying the prescribed white light, is to be supplied with red pyrotechnic lights, and shall shew "one of the red pyrotechnic lights . . . . on being approached by another . . . . vessel in sufficient time to prevent collision."

A British sailing trawler, in the North Sea, with her trawl in the water, and carrying the prescribed white light, did not shew a red pyrotechnic light to an approaching vessel until there was risk of collision by that vessel suddenly shutting in her red, and shewing her green light, on the trawler's port bow at the distance of one-third of a mile:—

Held, that the trawler had complied with the regulations, for the rule does not mean that it is necessary to shew the pyrotechnic light under all circumstances when a trawler is being approached by another vessel, but that the duty is thrown upon the trawler of shewing the pyrotechnic light in time to prevent collision when a vessel is approaching under such circumstances that there exists a risk of collision.

ACTION of damage by collision, transferred to the High Court for trial from the county court of Durham, holden at Stockton-

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on-Tees. The plaintiffs were the Hull Steam Fishing and Ice Company, Limited, owners of the sailing trawler *Sir Garnet Wolseley*; the defendants were the owners of the German barque *Orion*.

The facts—so far as material on the point as to the time when a red pyrotechnic light shall be shewn by a trawler to an approaching vessel—were briefly as follows:—

On January 15, 1891, the *Sir Garnet Wolseley*—a ketch of seventy-seven tons, and manned by a crew of five hands—joined the Red Cross Fleet of about eighty vessels, on the fishing grounds known as the Outer Silver Pits, in the North Sea, about eighty miles E. b. N. of the Spurn light-ship. At midnight, in obedience to signals from the Admiral of the fleet, the smack shot her trawling gear, for the morning haul, on the port tack. The wind was moderate from the eastward, the weather showery, with a slight choppy sea, and the smack under reefed mainsail, reefed mizen, and small jib, with helm lashed amidships, headed about S.E. b. S., but, allowing for leeway due to her warp leading astern over the port quarter, she was making a course of about S. b. E. at a speed of about one and half mile an hour. She carried one white light in a globular lantern on the weather (port) main crosstrees, and was supplied with the red pyrotechnic lights, commonly called "red flares." (1)

The *Sir Garnet Wolseley* was to windward of the fleet, there being only one other smack, about one mile off, on the weather bow, and at about 4.45 on the morning of the 16th the third hand, who was in charge of the deck, noticed, about four points

(1) By the Regulations for Preventing Collisions at Sea, Art. 10, Sched. Part II. (as modified by Order in Council, June 24, 1885), British sailing vessels in the North Sea engaged in trawling, and having their trawls in the water, may carry, "A white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to shew a clear, uniform, and unbroken light all round the horizon, and visible on a dark night, with a clear atmosphere, for a distance of at least two miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds, and shall, when so burning, be visible for the same distance under the same conditions as the white light. The white light shall be shewn from sunset to sunrise, and one of the red pyrotechnic lights shall be shewn on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision."

on the port bow and about one mile distant, the red light of a sailing vessel, which proved to be the *Orion*. As the light drew broader to the extent of about a point the *Orion* was apparently heading to pass astern of the smack to windward, but when about one-third of a mile off the loom of the vessel came into view, and the *Orion* then suddenly shut in her red and opened her green light, causing danger of collision. The third hand thereupon burnt a red flare; but, as the course of the *Orion* did not alter, he called the skipper, and lit a second flare. The skipper, finding the *Orion* running free close on his weather bow, put the smack's helm hard-a-port, and slacked out the mizen-sheet to ease the blow. The smack's head payed off to about S.; but the *Orion* with her yards square, and heading nearly S.S.W., struck the smack on the port bow with the bluff of her starboard bow and did considerable damage.

The *Orion*, a barque belonging to Memel, of 519 tons register, manned by a crew of ten hands, and bound from London to Middlesbrough in ballast, first saw the white light of the *Sir Garnet Wolseley* about two points on her port bow, at a distance of about three-quarters of a mile. The *Orion* was at the time on the starboard tack, steering N. b. W., but with three points leeway, making a N. Wly. course, and going about two and a quarter knots per hour. To avoid a collision with the smack to windward she starboarded and bore away; but as the helm was kept hard up, she ran into the *Sir Garnet Wolseley*, which vessel, it was alleged, shewed only one white light up to the time of the collision.

L. E. Pyke, for the plaintiffs, the owners of the *Sir Garnet Wolseley*. Under the rules it was the duty of the *Orion* to keep out of the way of the fishing smack, and she is alone in fault for not having done so. The *Sir Garnet Wolseley* gave her sufficient and timely warning of her presence, as she complied with the regulations relating to trawlers by carrying the prescribed white light, which was admittedly seen by those on board the *Orion* at a distance of three-quarters of a mile, and she shewed a red pyrotechnic light as soon as there was risk of collision. This risk arose when the green light of the *Orion* came into view.

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Up to that time there was no obligation on the smack to exhibit a flare, as there was no reason to apprehend danger.

J. P. Aspinall, for the defendants, the owners of the *Orion*. The *Sir Garnet Wolseley* committed a breach of the regulations by not giving sufficient and timely warning that she was trawling. The red flare was not shewn until the green light of the *Orion* was seen, and it was then too late to avoid a collision. As the joint speed of the two vessels was not more than four knots an hour, there must have been a considerable period during which the red light of the *Orion* was seen, and as that light did not appreciably alter its bearing, the third hand on board the *Sir Garnet Wolseley* ought to have known that the *Orion* was nearing him, and was an approaching vessel within the meaning of the rules. He should, therefore, have complied with the regulations by burning red flares. If this had been done, the officer of the watch on board the *Orion* would have been in a position to judge his distance and take proper steps in time to avoid collision. As, therefore, it cannot be shewn that the breach of the rule could by no possibility have contributed to the collision, the defendants are entitled to judgment.

JEUNE, J. In this case I have carefully consulted the Trinity Masters, and as to a very great part of the case, there cannot be, I think, any doubt whatever. The conduct of the *Orion* is a matter about which it is easy to come to a very clear conclusion. Taking her own story for this purpose, she says she saw two smacks ahead of her, one about one to one and a half points on her port bow, the other two to two and a half, one being half to three-quarters of a mile from the other. The first smack, she says, exhibited several pyrotechnic lights, and she starboarded and passed her close, and then proceeded to starboard and hard-a-starboard in respect of the second smack, the result being that she got her head round so much that in the collision, the *Sir Garnet Wolseley's* head being about S., the head of the *Orion* was S.S.W. To do that she must have performed a great part of a semicircle, which conduct appears to the Trinity Masters and myself to be little less than inexplicable, and I think she was wrong in adopting that course. This brings us to what

really is the one substantial controverted matter in the case. It is said that there was a breach of the regulations on the part of the *Sir Garnet Wolseley* in more than one respect, the first being, that although she shewed pyrotechnic lights at a certain time, she did not do so early enough, that, therefore, she committed a breach of a statutable regulation, and that in consequence of that breach it may be that the accident happened, or at least it is impossible to say that that breach did not in some way cause the collision. That gives rise to one or two questions. First, one has to consider what is the meaning of the regulation as to shewing pyrotechnic lights. The words are these: "That a white light shall be shewn from sunset to sunrise, and one of the red pyrotechnic lights shall be shewn on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision." That rule does not mean that under all circumstances, when a trawler and another vessel are approaching one another, it is necessary to shew the pyrotechnic lights, but what it really means is that when they are approaching one another under such circumstances that there exists a risk of collision, then there is thrown upon the trawler the duty of shewing the pyrotechnic light, and of shewing it in time to prevent collision. What happened in this case was, that when the green light was seen, and not before, the pyrotechnic light was shewn. Mr. Aspinall says that the red light being seen continuously four points on the port bow of the smack, and the green five points, shewed that there was risk of collision, the ships getting nearer and nearer, and that the pyrotechnic lights ought to have been displayed during the time the red light was seen. That appears to me to be a very ingenious argument if the foundation is sound. But I doubt if the foundation is sound. The witness says, not that the red light was seen continuously four points neither more nor less, but he says that the red light got a little broader on the port bow, and when he comes to the green light, he puts it a whole point broader; but we think the witness understated his case in this respect, and we think it is impossible that her red light should not have got considerably broader as it came on, and not remained at four points without alteration. It also appears

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to the Trinity Masters and myself that until the green light was seen circumstances did not arise which cast, under the rule, the obligation of shewing the pyrotechnic lights on the smack. That is an answer, and, of course, one answer is enough; but I am by no means sure that there might not be found another answer. I am very far from satisfied that even if the pyrotechnic lights had been displayed while the *Sir Garnet Wolseley* saw the red light approaching that she would have given the *Orion* any appreciable advantage, or contributed in any way to prevent a collision. She knew the vessels were trawling, and knew from the direction of the wind substantially which way they were going, and she saw the white light all the time; therefore, I greatly doubt if the pyrotechnic lights had been displayed at an earlier time it would have given her any advantage. A further point is made that the third hand, instead of burning a flare as he did, lasting some sixty-eight seconds, and then calling the captain, should have put the helm hard-a-port and let go the mizen-sheet, as the captain did when he came on deck. But the Trinity Masters are of opinion that the time was so short that, even supposing the man had had presence of mind enough to rush to the helm, put it hard up, and let go the mizen-sheet, it could have made no appreciable difference. I think, therefore, that the *Orion* is alone to blame for this collision, and I decree in favour of the *Sir Garnet Wolseley*, with costs.

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson Hull.*

Solicitor for defendants: *Robert Greening.*

T. L. M.

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1891
May 30;
June 3.

Admiralty—Collision—"Not under command"—Sea Collision Rules, Art. 5, *sub-ss.* (*a*), (*c*), (*d*).

By Art. 5 of the Regulations for Preventing Collisions at Sea, sub-s. (*a*), a steamship "which from any accident is not under command, shall at night carry" in place of the white light "three red lights in globular lanterns." By sub-s. (*c*), such a ship "when making way" shall carry the side lights. By sub-s. (*d*), the lights so "required to be shewn . . . . are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way."

Owing to an accident to her machinery, the speed of a steamship was reduced from 11 knots to 3 or 4 knots, but at that speed her steering power was unaffected, though she might not be able to reverse as quickly as before. She hoisted three red lights in place of the white light, and the red side light was not exhibited till the moment of collision with another vessel:—

Held, that the words "not under command" mean, that the course of the vessel cannot be so properly controlled or directed as to enable her to get out of the way of any peril which she may have to encounter. Therefore, though there might have been deterioration in the steamship's steering power, there was no want of command in that sense, and, with the speed she was able to attain, the exhibition of the three red lights was misleading, and contributed, with the absence of the red side light, to the disaster.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the Glamorgan Steamship Company, Limited, and others. The defendants were the owners of the steamship *P. Caland* and freight.

The facts—so far as material on the question whether the defendants' vessel was "not under command" within the meaning of the Regulations for Preventing Collisions at Sea—were as follows:—

On April 15, 1891, about 9 P.M., the weather being fine but hazy, the wind light, and the tide about low water slack, the screw steamship *Glamorgan* was in the Straits of Dover on a voyage from Antwerp to Cardiff in ballast. She was heading S.W. b. W. ½ W. magnetic, going full speed at about 9½ knots an hour, and exhibiting the regulation masthead and side lights for a steamer under way, when those on board the *Glamorgan* observed an unsteady white light about one point on the starboard bow, from one and three quarter to two miles distant.

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Shortly afterwards three red lights in a vertical line were seen, apparently on the same vessel, and the white light disappeared. The engines of the *Glamorgan* were thereupon eased down to slow, and her helm starboarded; but when the three red lights bore about five points on the starboard bow, the loom of the other vessel, which proved to be the *P. Caland*, came into view about two hundred yards distant, and her red side light was seen indicating risk of collision. The helm of the *Glamorgan* was put hard-a-starboard, two short blasts sounded on her whistle, and orders given for the engines to go full speed ahead; but the two vessels came into collision with such violence that the stem of the *P. Caland* was torn away on striking the starboard side, abaft the bridge, of the *Glamorgan*, and when the vessels cleared, after being locked together for more than an hour, the *Glamorgan* sank.

The *P. Caland*—a Dutch screw steamship of 2584 tons gross register, propelled by engines of 350 horse-power nominal, manned by a crew of 49 hands all told, with fourteen passengers, on a voyage from New York to Amsterdam, laden with a general cargo—passed the Varne light on the starboard hand, at a distance of one and a half mile, and was making about eleven knots an hour, on a N.E. b. E. course magnetic, when, about 8.15 P.M., a nut in the slide of the valve of the high pressure cylinder worked loose. The effect of this accident on the steaming power of the vessel and the details of the interviews on the subject between the master and the engineer are stated in the judgment. In the result the anchor was got ready; but as it was not thought safe, on account of the proximity of the Varne shoal, to stop the engines to repair the mischief, the slide was worked by hand, both on the high and low pressure cylinder, and an average speed of from three to four knots attained, whilst the masthead light was taken down, the three red lights prescribed by the regulations for a vessel "not under command" were substituted for it (1), and the side lights (it

(1) Regulations for Preventing Collisions at Sea, Art. 5 (*a*): "A steamship . . . . which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and . . . . in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical

was alleged), in accordance with the same regulations (1), were kept in their places. The screens in which these side lights were placed were hinged so that, from the bridge, they could be swung in or out as occasion required, and the learned judge came to the conclusion, on the evidence, that the red side light was turned in till the moment of the collision so as not to be visible to an approaching vessel.

About a quarter of an hour later those on board the *P. Caland* saw the white light of a steamer, which proved to be the *Glamorgan*, about half a point on the port bow, and distant about three miles. Shortly after the red light was made out on about the same bearing. The evidence was conflicting as to the extent the lights broadened; but, it was alleged, that by the time the vessels had approached to within a quarter of a mile, the red light was about three points on the port bow, and then a collision was rendered imminent by the *Glamorgan* opening her green, and shutting in her red light, apparently under a starboard helm. A long blast was blown by the *P. Caland* on the steam whistle, and the engines were ordered astern, but they could not be rapidly worked in that direction, and the collision occurred.

Sir Walter Phillimore and *Holman*, for the plaintiffs. The defendants, the owners of the *P. Caland*, are liable for a breach by their servants of the regulations by exhibiting three red lights at a time when the vessel was in fact under command, and had much greater steam power than the defendants admit. Her speed was not reduced to the extent of rendering her not under command, and as the vessel was making considerable way through the water, and the speed improved after the low pressure cylinder was got to work, she should have exhibited the regulation

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line, one over the other, not less than three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles . . . ."

(1) Regulations for Preventing Collisions at Sea, Art. 5 (*c*): "The ships referred to in this article . . . . when making way shall carry" the side lights.

(*d*) "The lights . . . . required to be shewn by this article are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way."

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masthead and side lights. Owing to the accident to the machinery the master of the *P. Caland* feared that his vessel would be out of command, and acted as if she actually were so, although his vessel had full steerage power and could go ahead, or go to port or starboard or stop, and was therefore in a much better position than a sailing vessel. The three red lights were under the circumstances misleading, and, combined with the absence of the red side light, brought about the collision, as those on board the *Glamorgan* were justified in assuming that the *P. Caland* was stationary in the water.

Barnes, Q.C., and *F. W. Raikes*, (*Pritchard*, with them), for the defendants, the owners of the *P. Caland.* The defendants vessel was not under command, as she could not manœuvre freely, and the engines might have to be stopped for their own safety without orders from the deck at any moment. She, therefore, could not efficiently comply with the regulations for preventing collision, and was bound to exhibit the three red lights. Even though the fact were that the *P. Caland* could go at considerable speed that would not decide the question, as a vessel may be going full speed but with her rudder gone, or other damage done rendering her not under command, and therefore bound to shew the three red lights and the side lights. The evidence on the part of the *P. Caland* is clear that the red side light was duly exhibited, and the *Glamorgan* was wanting in caution in the way she approached the *P. Caland.* Instead of keeping out of the way, the *Glamorgan* attempted to intercept the *P. Caland*, thinking the three red lights indicated a prize in the shape of salvage, and the collision was brought about by the *Glamorgan* throwing herself across the bows of the *P. Caland.*

JEUNE, J. (after stating the nature of the case, proceeded :—) The main question, I think, with regard to the *P. Caland* is whether she was right in adopting the measure which she undoubtedly did adopt, of taking down her masthead light and of hoisting three red lights in its place.

That is a question as to the facts of which there is no doubt, and as to the law of which I confess I entertain very little doubt either.

The account given by the master of the *P. Caland* is that she passed the Varne light about 8 o'clock, passing it about a mile to a mile and a half off. She was then going her full speed, which was eleven knots (I think her engineer puts her speed at a little less than that), and she was going a course which was N.E. b. E. magnetic.

At 8.15 the engineer found that there was something wrong, as he says, with the high pressure cylinder. It turned out to be that the nut which stops the backward movement of a slide in one direction had got loose, so that it gave way, and the slide of the high pressure cylinder was prolonged in one direction, so that, as was explained to us by the scientific witness, the effect was produced after a certain time of stopping the action of the slide altogether, and preventing any steam passing to the high pressure piston and cylinder.

The engineer communicated the fact to the master that there was something wrong with his engines and he was anxious to stop; but the master, from his proximity to the Varne shoal, desired to go on. There was an order given, which appears to have been obeyed, to get the anchor ready for the purpose of anchoring, the masthead light was taken down, and the three red lights were put up. The account of the *P. Caland* is that the side lights were kept out; at the same time it being a question upon which a considerable difference of statement exists, and upon which a good deal will turn presently. But, continuing the narrative of the *P. Caland*, they saw the approaching *Glamorgan* at about 8.30; but from the time that the engine was found to have gone wrong, throughout the time that they saw the *Glamorgan*, and right on to the time of the collision, which they put at about 9 o'clock, the engines continued to work.

At 8.45—that being the time, if I recollect rightly, when the engineer saw the captain for the second time—the engines were still working; they were working inadequately, because the high pressure cylinder was being worked only by hand, which apparently was not an efficient way of working it. After seeing the master he proceeded to work the low pressure cylinder by hand, which would be more efficient, and which it appears gave a somewhat better speed to the vessel, and after that time both

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the cylinders were worked by hand, the effect of that being that something like twenty revolutions were got out of the engines, fifty-six being the full amount, and a speed which the engineer puts at about three or four knots attained; and I may add that even after the collision was over, after the vessel was damaged as she was, the engines still appear to have been able to work, because they were used in order to get her clear of the wreck, she having been absolutely fixed in the other vessel, and, besides that, they went on for something like half-an-hour till the vessel was brought to a standstill while the engines were being repaired.

For the purpose of the decision I am going to give, it appears to me not very material whether the speed which the vessel was able to obtain was three or four knots, or whether it was something more. A good deal of fact has been elicited, and a good deal of argument addressed upon it, as to the actual speed of the *P. Caland*, and I am by no means sure that there are not considerations which, if I thought it necessary to go elaborately into them, might not bring me to the conclusion that the *P. Caland*, in putting her speed at three or four knots, was putting it somewhat under the mark, at any rate during part of the time from the moment when she first saw the *Glamorgan* until the collision. If it were necessary to consider the matter, I should have to deal with the question of the force of the blow, and the indications which that presents, and I am inclined to think that considerations upon that head might arise which might lead one to think that the *P. Caland's* speed was somewhat greater than she says it was.

Again, there is the place of the collision, and there I cannot help thinking that the *P. Caland*, in putting it inaccurately at a place considerably short of that at which it actually occurred, shews her estimate of her own speed, at three or four knots, to be an inadequate one. And it is further to be remarked, as Sir Walter Phillimore observed, that although it may be that when the engine was in its most disabled condition, and working only with the auxiliary valve by hand on the high pressure cylinder, a speed of only three or four knots was obtained; still some improvement was made upon that by working the low pressure cylinder by means of the auxiliary valve.

However, for this purpose I think it is sufficient to say that the speed obtained by the engines, even in their disabled condition, was three or four knots, or something more.

If that is so, was the *P. Caland* justified in hoisting the signal of the three red lights, supposing her to be, as I think she was, under command of her rudder, because there is no doubt she was able to steer perfectly well, and they say she kept her course without alteration either to the right or to the left. There is no suggestion that anything was wrong with her steering apparatus, or that there was not sufficient way on the vessel to enable her to steer; therefore, as far as steering power was concerned, there might have been deterioration in her power, but no want of command in that sense, and she had the speed which I have mentioned.

Under those circumstances, can she be said to have been not under command within the meaning of Art. 5 of the Regulations? "Not under command," one would think in themselves are words to which it is not very difficult to give a meaning consonant with their ordinary use. "Not under command" means this, that the course cannot properly be controlled or directed.

Now, if we look at sub-ss. (*c*) and (*d*) of Art. 5, there are expressions in them which appear to me to throw light upon what "not under command" in Art. 5, sub-s. (*a*), means. When you look at sub-s. (*c*) of Art. 5, it is clear that it is not because a vessel is making way that she necessarily is under command, because it is assumed in that Article that a vessel may be not under command and justified in hoisting three red lights, and yet making way, and so have placed upon her the obligation of still carrying her side lights. Upon the other hand, when you look at Art. 5, sub-s. (*d*), you find the phrase "cannot therefore get out of the way" is used as explanatory, and as identical, I think, with that of not being under command; and therefore a vessel that is not under command is a vessel which cannot get out of the way. It appears to me to follow, that if a vessel is in the position of being able to get out of the way—in other words, to direct her course so as to avoid any peril which she may have to encounter—that she then cannot be said to be not under command.

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Dr. Raikes's argument, and quite justly, was to the effect that because a vessel is capable of obtaining a high rate of speed it does not follow that she is under command. Certainly not. A runaway vessel, like a runaway horse, may be not under command, although it is capable of exercising a considerable rate of speed; but it appears equally true to say that, although the speed of a vessel is deteriorated and she cannot use her full speed, it does not follow that she is necessarily not under command.

All that in this case appears to me to have been the fact is that the vessel was not able to exercise her full rate of speed, and probably not able to reverse as quickly as before, but still she had not so completely lost her power of motion or of reversing, and not at all her power of turning by means of her helm, so that one can say she was not under command. So that my judgment is, with regard to a vessel in the circumstances which I find to have existed here, that the vessel was still under command, and therefore that she was wrong in hoisting the three red lights—a view in which the Trinity Masters coincide.

Something has been said as to the hoisting of the three black balls afterwards, after a stop of four hours, as she was going up the Dover Roads; but Dr. Raikes has said, and it appears to me so, that that does not carry it any further, because it was after the vessel was disabled—after the collision; and I do not think it necessary to enter into the question of whether or not she was justified then. I may doubt whether she was; but I do not think it necessary to enter into the question of whether she was justified in hoisting the three black balls, which was equivalent by day to the hoisting of the three red lights at night.

But I hold that hoisting the three red lights as she did was not the right thing to do, and was a thing which was extremely likely to mislead vessels approaching her, and did mislead the *Glamorgan*, and in my judgment contributed to the disaster which took place.

[The learned judge then dealt with the facts of the case of the *Glamorgan*, already stated, and also with the question as to the exhibition of the red side light by the *P. Caland*, also set out above, and continued:—]

The one fact which appears to me to be absolutely clear and

certain is this, that the *Glamorgan* starboarded her helm—I do not say exactly how much, but considerably. I have no doubt at all about that. If that is so, is it consistent, can it possibly be consistent, with the story that she saw the red side light of the *P. Caland*?

I do not think it can be. I think if she had seen the red side light of the *P. Caland* she never would have adopted the course of starboarding which they say she did. Therefore I think she did not see the red light of the *P. Caland.*

Of course it may be said she ought to have seen it, and then that brings me to the difficult conflict of evidence there is about the light of the *P. Caland.* I say conflict of evidence, because, although it is perfectly true that the evidence from the *Glamorgan* is negative in the sense that she did not see it, and the evidence on the part of the *P. Caland* is positive in the sense that they say the light was there to be seen, still, inasmuch as the *Glamorgan* saw the three red lights, and apparently seems to have seen them quite well, and is positive she never saw the side light at all, I cannot help thinking it is one of those cases where the assertions are absolutely contradictory, and where, if the red light had been there to be seen, the *Glamorgan* must have seen it; and if they did not see it, they are saying that to their knowledge which is untrue or highly inaccurate. Equally as to the *P. Caland,* if they say the red light was there and it was not, they must be saying that which is not accurate to their knowledge.

I must do the best I can under these circumstances, and the conclusion to which I am forced to come is this: that that light was not seen, because, for some reason or other, it was not there to be seen. I say "some reason or other," because I am not bound to say, and I feel difficulty in saying, the exact cause which for the time may have prevented the light from being seen. I cannot conceal from myself that there is a very great probability, to say no more than that, that the light on the *P. Caland* was turned in for a time. I know they say it was not so; but there is a strong probability that it was. The vessel, beyond all question, hoisted her three red lights; beyond all question she meant to come to an anchor at a very early time; and I cannot

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help thinking that it is extremely probable that, when she hoisted her three red lights, she meant to come to an anchor, and did that which she ought to have done when she did come to an anchor, namely, bring her red light in. Again, she may have prepared to bring her red light in by drawing the bolts back, and it may have been by the rolling of the ship that the red light was brought in, wholly or partly, and obscured.

At any rate, it was so possible for that light to be temporarily obscured, so probable that in view of what was going to happen the light was obscured, that I am obliged to come to the conclusion, being forced to come to a conclusion in the matter, that the red light of the *P. Caland* was turned in till the moment of the collision, and in such a way that the *Glamorgan* could not see it.

[The learned judge then dealt with the evidence as to a barque said to have subsequently nearly collided with the *P. Caland*, and as to conversations between the master of the *Glamorgan* and the master of the *P. Caland*, and concluded as follows:—]

The conclusion, therefore, to which I have come is that the red side light was not properly exhibited on board the *P. Caland*, and that the *Glamorgan* was misled by the three vertical lights. I think it probable she considered they were stationary lights, acted accordingly, and intended to pass quite close by the *P. Caland* for the purpose of speaking her, and perhaps for the purpose of helping her if she required help, and obtaining salvage if it was to be got, believing, as I think she had a right to believe, her to be stationary; and it was because she was not stationary, but was moving, that the collision did occur.

The conclusion which I come to upon this matter, although the facts are in some respects very contradictory, is that the *P. Caland* is alone to blame.

Solicitors for plaintiffs, the owners of the *Glamorgan*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *P. Caland*: *Pritchard & Sons.*

T. L. M.

IN THE GOODS OF SHEPHERD.

1891. May 12.

Probate—Will—Inspection of Testamentary Papers—20 & 21 *Vict. c.* 77, *s.* 26; 21 & 22 *Vict. c.* 95, *s.* 23.

Where the executors and the solicitor of a deceased testatrix had refused to give any information as to previous wills alleged to have been executed by the testatrix to persons who believed themselves to have been benefited by them, the Court, under the 26th section of the Court of Probate Act, ordered them to bring into the registry all wills and testamentary papers of the deceased in their possession, and to allow the applicants to take copies of them.

APPLICATION for discovery and inspection of testamentary documents.

Mary Shepherd, late of Appleton-le-Moors, in the county of York, widow, deceased, died February 15, 1891, leaving her last will and testament, bearing date October 29, 1886, which was proved in the district registry by the executors, Mr. George Lidgett, of Lime Street, in the city of London, shipowner, and Mr. William Henry Budgett, of Stoke House, in the city of Bristol, merchant.

The applicants were John Shepherd and Ann Shepherd, the nephew and niece of the husband of the deceased, who alleged that the testatrix had made previous wills by which they were largely benefited.

Their solicitors wrote to Messrs. Walker & Battiscombe, the solicitors to the executors, requesting to be informed as to existence and terms of the previous wills alleged to have been made by the deceased, and to be in their possession or in the possession of the executors; but they declined to furnish any information, and the correspondence between them ended with the following letter from Messrs. Walker & Battiscombe:—

"Personally we refuse your client any information, and decline to assist him. As soon as your client has appeared and shewn his interest in opposing the will of the deceased, and made himself liable for costs, we shall be pleased to follow the usual course and file the executors' affidavits as to scripts."

A caveat was entered on behalf of the applicants by Messrs. Williamson & Hill, which was duly warned on behalf of the

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executors, and notice of the warning was served on Messrs. Williamson & Hill, who took out a summons in the registry for a month's time to appear to the warning, which was dismissed with costs; and no appearance being entered to the warning, probate was granted to the executors in common form.

Application was made unsuccessfully in the registry for a subpœna calling on the executors to bring in the testamentary papers of the deceased, and in support of the present application, John Shepherd made an affidavit, in which he said: "The deceased was the widow and residuary legatee of my uncle, who died leaving personal estate to the value of between 80,000*l* and 90,000*l*., and also real estate. The said Mary Shepherd, up to the year 1889, has intimated to me on several occasions that I should receive considerable benefit under her will. She led me to believe that the real estate at Appleton would come to me, and that my brother, William Shepherd, would largely benefit. My sisters had been treated by my uncle, John Shepherd, as his own children. He had educated them, and I have reason to believe that at the time of his sudden death he was about to make ample provision for them. The said Mary Shepherd had full knowledge of this, and frequently intimated to my sisters that the intentions of her husband would be carried out in her will. To the best of my knowledge and information, the said Mary Shepherd had made several wills since the death of her late husband, under which larger benefits are given to me and my brother and sisters than under the alleged will of October 29, 1886; and the wills are in the custody, possession, or power of the said George Lidgett and William Henry Budgett, or of their solicitors, Messrs. Walker & Battiscombe."

Mary Shepherd also made an affidavit to the same effect, and she also stated that the deceased had told her that the will which would be in existence and would be acted on at her death was made by her prior to the year 1884, that it had been stolen from her or lost while she was in London, but that she had had it recopied.

In opposition to the motion, Mr. Lidgett, one of the executors, made an affidavit to the following effect: "The only wills of deceased which I and my co-executor have had in our possession

is the last will of testator, which has been duly proved, and a will dated May 24, 1883. I believe that the solicitors of the testatrix have a number of old wills in their possession; but I and my co-executor have never applied for such documents to be delivered to us, and I am informed and believe that they would refuse to produce the same except under an order of the Court. The other executor, Mr. Budgett, made an affidavit to the same effect, and Mr. Walker, one of the firm of solicitors acting for the executors, in his affidavit said: "I and my partner and his predecessor have for upwards of twenty years prior to the decease of the testatrix acted as her solicitors, and my firm have in their possession a number of old wills and drafts extending over that period; but a careful search among our papers for them would take some days."

Searle, moved on behalf of the applicants, under s. 26 of 20 & 21 Vict. c. 77, that the executors or their solicitors be ordered to bring into the registry all the wills and testamentary papers of the deceased which might be in their custody or possession, or that they should attend to be examined, or be ordered to answer interrogatories. The solicitors admit that they have various wills of the deceased in their possession, and the executors admit that they have one. The applicants cannot know what their interest is until they have had an opportunity of obtaining information as to the contents of these documents.

[He cited *In the Goods of Laws.* (1)]

B. Deane, contrà. This motion is unnecessary. The applicants ought to have proceeded under s. 23 of 21 & 22 Vict. c. 95, and should have taken out a subpœna to the executors to bring in to the Registry any paper or writing of a testamentary character which may be shewn to be in their possession or control.

[JEUNE, J. Why is not s. 26 of 20 & 21 Vict. c. 77, available too?]

Because it is superseded by the subsequent Act.

JEUNE, J. It is clear that the executors and solicitors admit the possession of wills and other testamentary documents executed

(1) Law Rep. 2 P. & D. 458.

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by the deceased, and I think they are bound to submit these testamentary papers for inspection. I shall make an order that the executors deposit in the registry the wills and other testamentary documents, the possession of which the solicitors admit in their affidavit, and that the applicants be at liberty to take copies of them. The applicants, however, must pay the costs of such deposit, and of this motion.

Solicitors for applicants: *Williamson & Hill.*

Solicitors for executors: *Walker & Battiscombe.*

W. L.

June 23.

IN THE GOODS OF DENNIS.

Probate—Will—Codicils—Revocation—Revival by Reference.

A testator executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874, and the will of 1875, died; and he made another codicil in 1881 disposing of the property which he had left to them—which he described as a codicil to his last will and testament—and which began in these words: "Whereas, my two sisters named in my codicil, dated May 12, 1874, are both since dead," &c.:—

Held, that the reference to the codicil did not revive it, and it was, therefore, excluded from probate.

APPLICATION for probate.

William Dennis, late of Penzance, Cornwall, died October 15, 1888, possessed of estate in Australia and in England. In 1867 he made a will in Australia, and subsequently made two codicils to it in England—one on December 23, 1869, and the other on May 12, 1874. On September 28, 1875, he made a will in Australia, which contained a clause expressly revoking all former wills and testamentary papers; and on January 17, 1881, he made a codicil to it in England—both of which were proved in Australia. Both the codicil of 1874 and the will of 1875 contained clauses bequeathing all his personal estate in England to his two sisters, Ann Dennis and Catherine Dennis, and appointing them his executors in this country. Ann Dennis died November 22, 1876, and Catherine Dennis on October 19, 1880. In consequence of their deaths he made the codicil of January 17, 1881, in the following terms: "This is a codicil to my last will

and testament which I have left in Australia: Whereas, my two sisters, Ann Dennis and Catherine Dennis, named in my codicil, dated May 12, 1874, are both since dead, and the bequests to and appointment as executors of them therein contained have therefore lapsed and become of no effect, I do hereby give and bequeath all moneys, goods, chattels, furniture, effects, and personal estate whatsoever of or to which I may be possessed or entitled in the United Kingdom to my brother, James Dennis, of Penzance, aforesaid, and I hereby appoint my said brother executor of all such personal estate as aforesaid in the United Kingdom."

On application being made for probate, a question was raised in the registry whether the codicil of May 12, 1874, was not referred to in the codicil of 1881 in such a way as to revive it.

Searle, moved for probate of the last will, dated September 28, 1875, and the codicil of January 17, 1881, without including in the probate the codicil of 1874. There is nothing in the codicil of 1881 expressing any intention to revive the codicil of 1874. On the contrary, the will of 1874 expressly revokes all previous documents. The cases referred to in the registry as raising a doubt were *In the Goods of Stedham* (1) and *In the Goods of Dyke* (1); but the cases which really govern the question are rather *In the Goods of Steele* (2) and *Rogers* v. *Goodenough*. (3) According to these cases, it is quite clear that to revive a revoked instrument, it must not merely be referred to, but in such terms as to indicate expressly an intention to revive. A reference by date is not sufficient to revive, and here the reference is merely by words of description.

JEUNE, J. I think it is quite clear that the codicil, so far from expressing an intention to revive the previous codicil, contains evidence that there was no intention to revive it. I, therefore, grant probate of the will of 1875 and the codicil of 1881, excluding the codicil of 1874 from the probate.

Solicitors: *Coode, Kingdon, & Cotton.*

(1) 6 P. D. 205, 207. (2) Law Rep. 1 P. & D. 575.
(3) 2 S. & T. 342.

W. H.

1890
Dec. 5, 6.
1891
Jan. 13, 20.

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Admiralty—Carriage of Goods—Non-delivery—Sale at Port of Distress—Law of the Flag—Duty of Master by German Law.

A German vessel, loading at Singapore for London, took on board, with other cargo, a quantity of pepper shipped, by British subjects, under English bills of lading in the usual form. On the voyage heavy weather was experienced, and the vessel put into a port of distress, both the ship and a portion of the cargo being damaged. The master telegraphed to this effect to the ship's agent at Singapore, and the contents of the telegram were communicated to the various shippers; but no instructions were received. Thereupon the master, acting in good faith, on the best advice he could obtain, and believing it to be for the benefit of the cargo owners, sold, with other cargo, a considerable portion of the pepper, much of which might have been reshipped, and some of which was in fact sent on by the purchasers in other vessels to London, where it fetched substantially the price of sound pepper.

In an action for breach of contract and conversion, brought by the plaintiffs, who were the consignees of the whole, and the purchasers of part of the pepper so sold by the master:—

Held, that the defendants, the owners of the vessel, were not liable, as the law of the flag must be looked at to determine the propriety of the sale, and by German law the conduct of the master was justifiable.

ACTION FOR NON-DELIVERY OF GOODS.

The plaintiffs were Edward Boustead & Co., the consignees of the whole of the goods in question, and Edward Pink & Sons, the purchasers of a portion of them. The defendants were the owners of the German ship *August*.

The claim was for breach of the contract to deliver contained in the bills of lading, or alternatively, in tort, for the wrongful conversion of the goods, viz., 1094 bags of pepper, weighing 70·46 tons, and of the arrived value, at 6*d*. per lb., of 3945*l*. 15*s*.

The defence, in substance, was that there was no breach of the contract contained in the bills of lading, as the delivery of the pepper was prevented by excepted perils, and, to the alternative claim, the defendants said that "the said pepper was lawfully and necessarily sold in the interests of, and on behalf of, the plaintiffs, and that the defendants have always been ready and willing to account for the proceeds of the sale of the said pepper on being paid the money due to the defendants in respect of the carriage of the said pepper and the charges in respect thereof."

The defendants further pleaded, in the alternative, that the ship was "a German vessel and entitled to fly the German flag, and to all the privileges of a German ship; and that the defendants and charterers of the said ship were German subjects resident in Germany, and that the master of the said ship was a German subject; and that the charterparty of the said ship is a German contract, and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law; and that by the laws of Germany the sale of the said goods . . . . was lawful and right."

By way of counter-claim the defendants claimed to be paid according to German law for the carriage of the goods the full freight, as well for that sold in the port of distress as for that delivered.

The main contention between the parties was, whether English law, or the law of the flag, was to be applied to determine the question as to the justification of the master in selling the goods, and if the law of the flag was to be applied, what were, by German law, the duties of the master towards the cargo owner in a port of distress.

The material facts were as follow:—

Under a charterparty made at Bremen, in the empire of Germany, November 24, 1888, between the defendants, German subjects, and the nominal charterers, also German subjects, acting for Behn, Meyer & Co. of Singapore, the ship *August*—of 1491 tons register, of Bremen, flying the German flag, and having a German subject, Hermann Jaburg, as master—was put up by Behn, Meyer & Co. at Singapore as a general ship sailing for London, and was loaded by them with a cargo of rice and other East India produce belonging to some nine or ten shippers.

A portion of the cargo consisted of 1732 bags of pepper shipped by the plaintiffs' firm of Boustead & Co., British subjects, carrying on business at Singapore, under five bills of lading dated May 14 to 16, 1889, printed in English, in the usual form, signed by the master as agent of the defendants, making the goods deliverable at the port of London to the plaintiffs Edward Boustead & Co., or to their assigns, on payment of freight at the rate of 30*s.* per ton of 12 cwt., the act of God, Queen's enemies

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(altered in three of the bills of lading to the "Emperor's enemies"), fire, all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted.

The goods in question were of the description known as keong pyt, a black pepper which comes from the north of Siam, where the peppercorn is dried in the sun so that the outer skin, or husk, does not adhere, and on this being removed white pepper is obtained. According to the evidence of the plaintiffs, sea-water has very little effect on this pepper, as it does not penetrate the inner skin.

On May 25, 1889, the *August* left Singapore, and, meeting with a continuance of heavy weather, causing considerable damage, the master, on August 14, put into Table Bay, where he placed the vessel (in accordance with the terms of the charter, in the event of putting into port on the way) in the hands of the charterer's agents, Thomson, Watson & Co., of which firm the sole member, C. H. Knight, was Lloyd's agent for Cape Town and consul for several countries. The master also saw the agent of the underwriters of the ship, and throughout his stay, as occasion required, consulted the German Consul-General.

On August 15, by Mr. Knight's advice, the master telegraphed to Behn, Meyer & Co. at Singapore, that the *August* had "put in from stress of weather, damaged." The contents of this telegram were communicated to the various shippers, including Boustead & Co., but no notice was taken by them. On the following day three surveyors appointed by the master, on the recommendation of Mr. Knight and with the approval of the German Consul, surveyed the vessel as she lay in Table Bay. They found that, though the vessel was only making a little water, the foremast and rudder head were sprung, and part of the cargo giving out much heat, and the state of the vessel indicated that there had been considerable straining and starting of the main deck waterways, stanchions, hatches, and covering boards. They recommended that she should be taken into dock, and sufficient cargo discharged to enable the necessary repairs to be effected. Owing to her heavy draught the vessel could not be taken into dock, and she was therefore moored at the

outer, or coaling, jetty, where, on August 19, the ship was surveyed by the same three surveyors, and a detailed report made of the repairs the vessel required. On August 21, Thomson, Watson & Co. wrote to Behn, Meyer & Co., confirming the above telegram, and adding that "the cargo, it is feared, will also be damaged." A letter to Singapore took about three weeks in transit. On August 27 the same three surveyors examined the hold and recommended (inter alia) that the "discharge of cargo out of the after-hatch be continued until the vessel be sufficiently lightened to permit of the rudder being unshipped." They also examined the cargo, which had been landed and stored. This included 1567 bags of pepper, of which about a quarter had to be rebagged to be landed as the bags were rotten and wet. They "found that a considerable quantity was more or less stained and damaged by sea water," and they recommended that "competent merchants be requested to examine and report as to the advisability of reshipping the damaged portion or otherwise disposing of the same."

On the suggestion of Mr. Knight, the master thereupon appointed, under the authority of the German Consul, two merchants, Mr. Dickson and Mr. Brown, to survey the cargo landed. They were general merchants, in the habit of surveying damaged cargoes, but admittedly not experts in pepper. It was alleged that there were no such specialists to be had, and that whole pepper imported as merchandize, or arriving as damaged cargo, was not much known in Cape Town.

According to the evidence of Mr. Knight, Mr. Dickson, and Mr. Brown, who were all examined on commission, the first survey was held on the same day (August 27), the date, August 30, in the notarial copy of the report being alleged by them to be a mistake for the date of the second survey, the first being treated as preliminary only and not charged for. The report stated that they "found both stores so blocked up with the cargo that it was impossible to ascertain the condition thereof," and they recommended that the "same be carefully sorted, and the damaged portion separated from the sound, so as to enable them to hold a further survey." It was alleged, however, by Mr. Knight, Mr. Brown, and Mr. Dickson, that the surveyors verbally intimated

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that they could see a large portion was badly damaged, and would most likely have to be sold.

On the same day (August 27) the master, on the advice of Mr. Knight, telegraphed to Behn, Meyer & Co.: "*August.* Some part of cargo discharged and seriously damaged; surveyors direct sale by auction without delay"; and on the following day a letter was written confirming the telegram. The contents of the telegram were communicated to the shippers, including Boustead & Co., and Mr. Knight delayed the sale for a week in order to give time for a reply, but none came.

On August 30 a survey was held by Mr. Dickson and Mr. Brown, in the presence of Mr. Knight, when they found that the damaged bags had been stacked too near together, and proposed to examine them again, but recommended that a portion should be advertised for sale. Accordingly, by order of the master, and under the authority of the German consul, a sale was advertised for September 3, of, amongst other cargo, 500 bags of black pepper.

On September 2 a further survey was held by the same two merchants in Mr. Knight's presence, and, according to the notarial copy report, they found all the cargo they examined (viz., rice, sago, flour, and 500 bags of pepper) "more or less damaged by sea water, heated, and in a state of decomposition," and "quite unmerchantable," and they recommended that the "same be sold by public auction."

On September 3 the sale took place. It was conducted by auctioneers recommended to the master by Mr. Knight, and the 500 bags pepper fetched prices varying from 50*s.* 6*d.* to 38*s.* 6*d.*, and averaged 40*s.* 8*d.* per 100 lbs., duty paid. On the following day, Thomson, Watson & Co. wrote to Behn, Meyer & Co. that this sale had taken place; and this letter, together with those of August 21 and 28, were acknowledged by Behn, Meyer & Co. on October 22.

On September 4 the three surveyors of the ship reported finding a considerable quantity of badly damaged cargo, which they recommended should be landed, and on September 6, ninety-seven more bags were taken out of the ship. On September 7, and following days, a second portion of the cargo, including 580 bags pepper, was advertised as for sale on September 10. On

the morning of that day Mr. Dickson and Mr. Brown examined it, and reported it "to be all more or less damaged by sea-water, much heated, and a large portion thereof in a state of decomposition, and, consequently, quite unmerchantable"; and they recommended that the whole "be sold by public auction." The same afternoon the second sale was held, and 580 bags black pepper were sold, fetching in one lot 38*s.* 9*d.* per 100 lbs., duty paid. Information of this sale was communicated to Behn, Meyer & Co. in a letter dated the following day from Thomson, Watson & Co., and on October 2 and 9 they again wrote that there would be a further sale of damaged cargo, including pepper.

On October 9, and following days, a third portion of the cargo was advertised as for sale on the 11th, including a small quantity of pepper, and on October 11 Mr. Dickson and Mr. Brown held a survey on this portion of the cargo and reported as before. In recommending a sale, Mr. Knight, as on the two previous occasions, concurred, and on the same day the third sale took place, fourteen bags of pepper fetching 46*s.* per 100 lbs., duty paid. On October 16 Thomson, Watson & Co. wrote to Behn, Meyer & Co. that this final sale of damaged cargo had taken place.

The 1094 bags so sold realized 2556*l.* The remaining 570 bags, out of a total of 1664 landed, were reshipped as sound, and sixty-eight bags were not taken out of the ship.

Of the above 1094 bags of pepper sold in Cape Town, 240 were, on September 11, shipped in the steamer *Garth Castle*, by the purchasers, for London, where they were sold on October 15, and fetched prices varying from 5⅝*d.* to 5¾*d.* per lb., the market price for sound pepper being 6*d.*

On October 2 another consignment of 101 bags followed in the steamer *Tartar*. These were sold in London, on November 13, at prices varying from 5*d.* to 5¼*d.* per lb., the market having fallen a little. On October 16 five bags were sent in the *Moor* to London, viâ Natal, and the remainder was either retailed by the purchasers to shopkeepers up country, in parcels of about twenty-five bags, or ground and disposed of locally by the lb. the whole averaging a profit of about 15 per cent.

On November 2, Thomson, Watson & Co. telegraphed to Behn, Meyer & Co. that the "Expenses, *August*, 2600*l.* Will shippers

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advance? Unless needful fund provided must have recourse to bottomry." This was communicated by a circular to the shippers, and, amongst them, Boustead & Co. appended their initials to the word "No." On November 4 a reply was sent, "Shippers decline." The expenses were then met by the owners of the vessel arranging for opening a bank credit to the amount required; and, on November 17, the necessary repairs to the ship having been completed, the *August* sailed, reaching London in January, 1890, with the remainder of the cargo not sold in Cape Town.

1890. Dec. 5, 6. The action was tried before the President (Sir James Hannen), and the defendants called a German advocate, practising at Bremen, Mr. Hermann Hildebrand, to give evidence as to the German law bearing on the question of the duties of the master towards the cargo owner in a port of distress. His evidence is fully dealt with in the judgment, and may be shortly summarized thus: If, in the emergency which had arisen, the master of the *August* was advised to sell the cargo by the best surveyors that could be procured, and the master, believing it to be for the benefit of the cargo owner, acted honestly upon the conviction of the surveyors that greater damage would result to the pepper if reshipped, and if the shippers of the cargo, who were the only persons the master knew, were duly informed of the surveyors' recommendation, and took no notice, that would suffice by German law to justify the sale, and it was not material that the sale of the pepper might, in the opinion of experts not on the spot, have been avoided, and the pepper reshipped on board the *August*.

In support of his view of the law, Mr. Hildebrand cited, in addition to the case mentioned in the judgment, the following: *North German Insurance Co.* v. *Brauss & Co.* (1); *D. Knoop* v. *Alliance Insurance Co.* (2); Lewis's Commentary on the Commercial Code, notes on arts. 499 and 504.

Counsel for the plaintiffs objected to evidence being given of German law on the ground that the case was governed by English

(1) Decisions of the Reichsoberhandelsgericht, vol. iv. p. 83.

(2) Decisions of the Reichsoberhandelsgericht, vol. xii. p. 402.

law. The President received the evidence subject to the objection, and, after taking time to deliberate, the President, on January 13, 1891, intimated that he could not relieve counsel for the plaintiffs from the necessity of arguing the case on the basis of the German law applying. On January 20 the case was argued by—

Barnes, Q.C., and *Hollams*, for the plaintiffs. The sale of the goods in question at Cape Town was improper, whether the facts are to be judged of by English or by German law, for, by the express terms of art. 504 of the German Commercial Code, it is the duty of the master to communicate, if possible, with the owner of the goods. The telegram to the charterers which was communicated to the shippers was incomplete, and was no compliance with the provision. It was insufficient by English and German law, for Boustead & Co. could not infer that the cargo damaged was their pepper; on the contrary, knowing that their pepper was not easily damaged, they would infer that the damaged goods consisted of rice or other perishable cargo.

As to the sale, the grounds of justification to be deduced from the decisions in the English and German Courts are substantially the same, for the duties of the master under either law are all included in the words "reasonable care," and under both laws the master must exhaust all available means. In this case the law to be applied is English law, because the contract between the parties evidenced by the bill of lading, signed by the master, is an English contract in the usual form, by which the defendants became bound to deliver the goods in question unless prevented by one or more of the excepted perils. There is no indication in the contract that the law of the country where the contract was made is not to govern both the nature of the obligation and the interpretation of it. The attempt to get rid of the express contract, and bring in the law of the flag, by shewing urgent necessity for the sale, fails; for the question of necessity is a question of fact, and the evidence does not shew a real necessity. It is not disputed by the plaintiffs that the *August* met with heavy weather, nor do they contend that it was not reasonably necessary to put into a port of distress; but the plaintiffs

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say that, in the absence of the consent of the cargo owner, the condemnation and sale of the pepper should not have taken place. The survéyors employed were not experts in pepper, and were not qualified to give a satisfactory decision as to the necessity of the sale.

[Owing to the view of the evidence taken by the learned judge as to the surveys having been, in fact, held, and the pepper condemned prior to the issue of the advertisements for the sale, the arguments of counsel to the contrary are omitted.]

It may be true that the master is not bound to prove that what he did was the best that could be done; but even by German law he must consider it to be the best—that is, he must act after consideration, and not simply on the advice of surveyors. Here, however, the master acted on their advice without sufficiently and deliberately exercising his own judgment, and in the result, as the evidence shews, he was wanting in a sound and wise discretion, as the sale was not a necessity, and the master could have seen for himself that the pepper was not damaged to the extent contended for. Out of the 1094 bags of pepper sold at the Cape, 346 bags were at once sent on to London, where the bulk realized substantially the price of sound pepper. The remaining 748 bags were sold at very good prices, and much of it was resold at a handsome profit, some of it being disposed of at 1*s.* 4*d.* per lb., as compared with 6*d.* per lb., the value of sound pepper in the English market. The evidence shews that this sort of pepper sustains very little damage from immersion in salt water, and that it improved by keeping; so that if it had been stored, the stains in the bags would have disappeared, and the pepper, after being dried in the sun and exposed to the air, would have recovered its normal appearance. The plaintiffs do not impute gross bad faith to the persons engaged in this matter, but the word "decomposition," used in the reports, has no meaning in regard to this pepper, and shews that the surveyors had no sufficient acquaintance with this particular description of goods, and the temptation to earn the commission, which follows the condemnation of a ship and her cargo, must not be disregarded. In this case the account sales shew that about 10 per cent was deducted for such commission on the sales, and a further

3 per cent. for auctioneer's commission, so that a large profit is made in this way.

The further arguments of counsel sufficiently appear from the judgment. In addition to the cases there mentioned the following were cited: *In re Missouri Steamship Co.* (1); *The Peninsular and Oriental, &c. Co.* v. *Shand* (2); *The Australasian Steam Navigation Co.* v. *Morse* (3); *Notara* v. *Henderson* (4); Abbott on Shipping, 12th edit. p. 310.

Sir Walter Phillimore and *F. W. Raikes*, (*A. Pritchard*, with them), for the defendants. The law of the flag applies, and the duties of the master, with regard to the sale of the portion of the cargo in dispute, must be determined by German law, which is the only law the master could know, and apply, in the emergency in which he was placed in a port of distress. [The cases cited by counsel in support of this contention are all mentioned and considered at length in the judgment.] The fact that two of the bills of lading contain the words "Queen's enemies" is not material, as they will be read as referring to the enemies of the country of the flag: *Russell* v. *Niemann.* (5) It is misleading to refer to authorities in English law, for, so far as the two laws agree, it is unnecessary, and this case turns on the evidence given by Mr. Hildebrand, shewing that the German law differs from English law as to the degree of responsibility of the master. English law requires the master to act as a wise and prudent man; the German law goes a step further, and adds, where a wise and prudent man has obtained the opinion of experts, and has no reason to distrust them, he may act upon that opinion, and be relieved from responsibility. The evidence as to the prices fetched at subsequent resales of the goods is irrelevant, for, if the master fulfilled the duties imposed upon him by the law of the flag, the sale is justified, and, by German law, the cargo owner is not at liberty to shew the inexpediency of the sale by the result, if the master has acted honestly, and thought he was doing the best he could on the advice of experts, although what he did do was not in fact the best that might have been done;

(1) 42 Ch. D. 321.
(2) 3 Moo. P. C. C. (N.S.) 272.
(3) Law Rep. 4 P. C. 222.
(4) Law Rep. 7 Q. B. 225.
(5) 17 C. B. (N.S.) 163.

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you are not to consider the absolute necessity, but whether the master acted honestly and reasonably under the circumstances. Necessity justified the sale, as the pepper was so damaged in consequence of the perils of the sea excepted in the bills of lading, that it was impossible, in the opinion of the best experts obtainable at the Cape, to bring the pepper to the port of destination in a merchantable condition.

As to communication with the cargo owners, there was no obligation on the master, by German law, to find out the owner of the goods and apply to him, where the bill of lading gives no more information as to the consignee than "Edward Boustead & Co., or to their assigns," at the port of London; and the master did in fact inform the shipper, Boustead & Co., through Behn, Meyer & Co., of what was going on; but no instructions were received. The defendants contend that it has been proved that the German law was fully complied with; that the surveyors were properly appointed, and were the best that could be obtained; and that they took proper steps to inform themselves as to the condition of the pepper. The master accompanied them and was looking on, and he was told that it was the proper thing to do to sell the pepper there and then, and that it would get worse by delay.

Assuming that the effect of the evidence is that the goods were not incurably damaged, because this particular kind of pepper is a peculiar product almost indestructible in water, still it was not the sort of pepper known at the Cape, and the master would naturally suppose that it would be injured by sea-water like other produce of this nature. It is also not clear that if it had gone on in the *August* it would have been merchantable, as all the pepper out of the *August* which was sent to England by steamer was shipped as sea-damaged cargo, and the evidence shews that the expense at a place like the Cape of warehousing, sifting, sorting, cleaning, drying, and rebagging, with a view to reshipment, would have been so great as to be prohibitory.

Hollams, in reply. An English Court, before applying foreign law to a given case, will exercise its own judgment, and inquire whether the reasons given by the advocate called to state the law satisfy the Court, and whether his conclusions as to the meaning

of the Code are correct. Now, the view of the advocate is that the master is justified because he called in experts; but there must be urgency, and it is a question of fact to be determined by this Court whether there was urgency requiring the experts, and if the master, knowing that there was no urgency, blindly followed the opinion of the experts, that would be negligence.

As the ship was damaged and required repairs, and these were not completed until November 17, the adventure could not proceed further till then, and the master, therefore, had ample time to consider the question; but the sale of the goods took place in a hurried and unsatisfactory manner. It is admitted that there was no detailed examination bag by bag, but that the bags were examined generally. Pepper, however, is a valuable thing, and the master ought to have noticed that the examination was not conducted with sufficient care. The dates are strong against the master; for it is in evidence that 240 of the bags of pepper first sold were on their way to England in the *Garth Castle* by September 11; and as, by English law, if the cargo could be delivered in England in a merchantable condition the master was bound to tranship and send it on, it is not unreasonable to say that, if a little caution had been exercised, the master would have found that the goods were being actually sent to the same place (England) where he had undertaken to deliver them.

[THE PRESIDENT. But it was sent on as damaged pepper.]

It does not appear whether the bills of lading were clean or not, though, no doubt, some of the witnesses have stated that the pepper was treated as damaged.

SIR JAMES HANNEN, President [after stating the nature of the action, proceeded:—] This action is brought in respect of the pepper sold at Cape Town as damaged, it being contended further for the plaintiffs that such sale was not necessary or justifiable.

The defendants pleaded that the *August* was "a German vessel, and entitled to fly the German flag, and to all the privileges of a German ship; and that the defendants, and charterers of the said ship, were German subjects resident in Germany; and that

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the master was a German subject; and that the charterparty was a German contract; and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law; and that by the German law .... the sale of the said goods was lawful and right."

The question raised by this plea was first argued before me, it being agreed that the other questions arising in the case should stand over until I had determined whether the propriety or impropriety of the conduct of the captain in selling the pepper alleged to be damaged was to be determined by English or German law.

The broad distinction suggested to exist between the English and German law on the subject under consideration is that, by the English law, it is not sufficient to justify the sale of goods at a port of refuge that the captain acted in good faith and in the exercise of the best judgment he could form, if it should be held by the tribunal before which the question may come that there was not in fact a real necessity for the sale; whereas, by the German law, the sale will be justified if the captain, after taking the best advice he can obtain, honestly comes to the conclusion that a sale is best for the interest of the persons for whom he is called upon to act in the emergency which has arisen.

This is not given as a complete statement of the German law on the subject, but merely as an indication of the nature of its difference from the English law for the purposes of the present inquiry.

The argument for the defendants is based on the principle laid down by the Court of Exchequer Chamber in *Lloyd* v. *Guibert* (1), that, where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

In the very learned judgment in that case, delivered by Willes, J., on behalf of the Exchequer Chamber, he says (p. 129): "Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought

(1) Law Rep. 1 Q. B. 115.

rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce."

This subject has since been very fully considered by the Court of Appeal in the case of *The Gaetano and Maria.* (1) In that case, goods were shipped by British subjects under a charterparty made in London for the carriage of goods to England in an Italian ship. The ship put into Fayal in distress, and the master entered into a bottomry bond, by which he hypothecated the cargo as well as the ship, without communicating, as he might have done, with the cargo owners, but which, by the Italian law, he was not bound to do. The question was whether the captain was bound by the English law, by which he would have had no authority to bind the owners of the cargo without communicating with them, or by the Italian law, under which such communication was unnecessary.

The present Master of the Rolls, in giving judgment in that case, says (p. 146): "What is the principle which ought to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when that law is contrary to the law of his own country? Why should it? Is the master of the ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master, on board an Italian owner's ship, what is the meaning of the transaction but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship, unless he is bound to another mode? Upon principle, it seems to me that he who ships goods on board a foreign ship ships them to be dealt with by the master of that ship according

(1) 7 P. D. 137.

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to the law of the country of that ship, unless there is a stipulation to the contrary."

And after reviewing the facts of the case of *Lloyd* v. *Guibert* (1), and pointing out that there the contract was one of affreightment, he continues: "Still, if the contract was there held to be a foreign contract, because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorize our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master."

And Cotton, L.J., thus states the principle applicable (p. 149): "When the owner of goods puts them on board a vessel, he must authorize the owner of that vessel, and his agent the captain, to deal with those goods according to the law of the country to which that vessel belongs." This "rule is applicable, because no one who ships goods on board a vessel can be ignorant of the flag—that is, of the country to which the ship belongs—whilst the master would be in a very difficult position if he had to inquire what was the law of the country of the goods—if, as regards one portion of the cargo, he had power to deal with it when the necessity arose in one way, and as regards another portion of the cargo in another way."

This appears to me to be a binding authority in the present case, unless a valid distinction can be drawn between the law which is to govern the right of a master to hypothecate cargo and that applicable to his right to sell it in circumstances of emergency. I can find no such distinction, and it will have been seen that the passages I have quoted from the judgments in *Lloyd* v. *Guibert* (1) and *The Gaetano and Maria* (2) are perfectly general, and apply with equal force to the case of a master called upon in a position of difficulty to determine whether he should sell goods as to that of one having to determine whether he should pledge them.

It was urged also for the plaintiffs that a later case in the Court of Appeal, *The Chartered Mercantile Bank of India* v. *Netherlands, India, &c., Co.* (3), modified the decision in *The*

(1) Law Rep. 1 Q. B. 115. (2) 7 P. D. 137.
(3) 10 Q. B. D. 521.

Gaetano and Maria (1), and supported their contention. I am of opinion, however, that it has no such effect. There is no suggestion throughout the judgments there delivered that there was any intention to vary the law as laid down in the earlier cases I have cited. There goods were shipped under a bill of lading containing, amongst other excepted risks, "collision." In the course of the voyage the carrying ship came into collision with another vessel belonging to the same owners, both ships being to blame. It was a question in dispute whether both were Dutch. It was held that, whether they were Dutch or not, the defendants were liable in tort for the negligence of their servants on board the ship with which the carrying vessel collided. This case does not appear to me to throw any light on the one now under consideration. It was held in that case that the contract was English, even though the ship in which the goods were carried was Dutch. Assuming that the contract in the present case was English, that does not govern the question of what law is to be applied to goods carried in a German ship, a state of facts not provided for, and not contemplated by the contract, having arisen. Such facts existing, we must consider what law it is just to apply in these exceptional circumstances, and, for the reasons so forcibly stated in *Lloyd* v. *Guibert* (2), and in *The Gaetano and Maria* (1), it appears to me that the master of the *August* could only be expected to act in conformity with the law of his flag.

Holding, therefore, as I do, that the captain, in dealing with the damaged cargo at the port of distress, was entitled to act in accordance with German law, I proceed to consider what is the German law applicable to such a case.

Upon this point I have to rely solely on the evidence of Mr Hildebrand, a witness called for the defendants. No witness was called on behalf of the plaintiffs to contradict Mr. Hildebrand's testimony, and that must be accepted by me as correct, judged, of course, in its entirety as modified by cross-examination. I may add that Mr. Hildebrand appeared to me to give his evidence with intelligence and candour, and without bias in favour of the party by whom he was called. Mr. Hildebrand bases his evidence on the 504th article of the German Commercial

(1) 7 P. D. 137. (2) Law Rep. 1 Q. B. 115.

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Code. That article is thus rendered in Dr. Wendt's translation of the code, which the witness proved to be correct.

"The master shall take every possible care of the cargo during the voyage in the interest of those concerned therein. When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interests of those concerned in the cargo as their representative, to take their instructions, if possible, and, so far as the circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary. He is particularly in such cases authorized to discharge the whole or a portion of the cargo; in extreme cases, if on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport."

It was said for the plaintiffs that the translation should be "most extreme cases." I see no practical difference between the two phrases; but further, I accept the witness's evidence that the words are explained by what follows them, namely, that the cases referred to are those where "on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted."

The interpretation which the witness states the German Courts put upon this article is that, if, in the extreme cases referred to, the captain, in the exercise of his discretion, after taking the best advice he can get on the spot of experts or otherwise, comes to the honest conclusion that it is best in the interests of the cargo owner that the cargo or a portion of it should be sold, he is not bound to prove that it was in fact the best course, and in particular that the cargo owner cannot impeach the captain's conduct by proof that in the result his conduct turned out to be inexpedient or damaging to the cargo owner.

In support of his evidence of what is the German law on that subject, the witness referred to several decided cases, some prior to the promulgation of the code, others subsequent; the former, he stated, are relied on in German courts as of authority in

shewing the interpretation to be put on the general language of the code. Assuming, as I am bound to do, in the absence of evidence contradicting the witness, that his evidence is correct, I think that these decisions support the witness's statement of the law.

The case in which the legal principles on this subject are best illustrated is that of *Moeller Brothers* v. *Biacone, Busch, & Co.*, reported in Seebohm's Collection of Judgments in Maritime Cases, vol. i., p. 257, decided in 1861.

There the plaintiffs, the owners of rice, shipped at Moulmein, sued the owners of the ship for the alleged wrongful act of the captain in selling the rice at Moulmein, to which port she was compelled to return in distress. The Court of First Instance held that the plaintiffs could not recover, because the sale had been made with the concurrence of Apfel & Co., the shippers of the cargo.

This decision was reversed on appeal on the ground that Apfel & Co. could not be treated as parties who could dispose of the cargo, bills of lading to order having been signed by the captain which were no longer in the possession of Apfel & Co.

The Court of Appeal, therefore, held that on the facts the captain was not justified in selling the rice.

But on appeal to the highest Appeal Court this decision was reversed and the judgment appealed from restored, but not on the ground relied on by the Court of First Instance. The Supreme Court of Appeal held that the captain could not justify his acts merely as having been done with the consent and advice of Apfel & Co., but that he could justify them as having been done in the exercise of his judgment in good faith on the best advice he could obtain.

It is unnecessary to set out the facts of the case, which in many respects resemble those of the case before me; but the principles upon which the Court acted are very clearly set forth in the following, the governing passage of the judgment:—

"The defendants must either justify the proceedings of the captain or take on themselves the consequences of his acts to the extent of their fortune de mer.

"The obligation to give this justification (of the captain) may

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be understood in different ways. One would cast on the master, as well as on the owners, to prove the absolute expediency or usefulness of the proceedings of the master, or on the other hand one might consider it sufficient if he could be proved personally to have acted without blame; so that the consequences of inexpedient and damaging measures taken by the master must be borne by the parties interested in the cargo so long as he, the master, was induced to take them without culpa. The judgment of the Appeal Court taking the first line of argument cannot be assented to; on the contrary, so far as the duty of the master or owners under circumstances such as existed in this case is concerned, the only question is whether the proceedings of the master attended by damaging results could be considered from his standpoint as being expedient. For the master who has the custody of the goods intrusted to him is, on the one hand, obliged. and on the other is authorized, to take in extraordinary cases such measures regarding the goods as may be considered in the circumstances as being in the interest of the owner, and in doing this he may and must follow his own well-considered discretion, It is true in doing this he has to apply the greatest diligence; for in a contract of hiring, of which the contract of affreightment appears to be a species, there is such custody as diligentissimus paterfamilias suis rebus adhibet; but if the master acts with all necessary care, and yet the measures taken by him afterwards prove inadmissible or even damaging, yet he, and consequently the owners, cannot be rendered responsible."

It is unnecessary to set out the other German decisions relied on. They were cases of the sale of ships, as to which there are particular provisions in the code in exoneration of the captain who employs experts though he may have been misled by them.

It was contended for the plaintiffs that as there are no such provisions expressly applicable to the sale of cargo, they had no bearing on the present case. Mr. Hildebrand, however, stated that they were applicable by analogy. They seem to me to tend rather to support than to detract from the evidence of the witness on the main point that the captain who acts in good faith on the best advice he can get, and believing that the sale of cargo in a port of distress is for the benefit of the cargo owner, is exonerated

(as well as the shipowner) from responsibility, though it may ultimately turn out that the advice was bad.

I now proceed shortly to state the facts, and to examine whether the captain of the *August* did fulfil the obligations of the German law as stated in the code and explained by Mr. Hildebrand

[The learned judge then shortly reviewed the evidence already set out more fully—as to the master of the *August* having consulted with Mr. Knight, with the German Consul, and the agent for the underwriters of the ship—as to the telegrams to Behn, Meyer & Co., which were communicated to Boustead & Co. at Singapore—as to the selection of surveyors, on the recommendation of Lloyd's agent, and with the approval of the German Consul, to survey the ship—as to the subsequent appointment of two merchants to survey the cargo—as to the surveys held and the advice given as to a sale of a portion of the cargo, and the steps taken on the sale of that portion, and proceeded:—]

No suggestion of fraud was made before me against anyone. But it was contended that the pepper ought not to have been sold, but should have been dried and rebagged and reshipped. From the evidence it appears that Mr. Knight considered the expense of this, and the surveyors advised that this should not be done. A commission was appointed for the examination of witnesses at the Cape, and many, including Messrs. Dickson and Brown, were so examined. They were both of them merchants of position of long standing at the Cape, and they gave evidence of the condition of the pepper, and gave their reasons in justification of the advice they gave; and I am satisfied, upon a careful examination of the whole evidence, that they acted in perfect good faith, and in the belief that there was, as Mr. Brown expressed it, "a commercial necessity for the sale as the best course open, and that it was the wisest thing to do for the benefit of all concerned."

Looking at the matter ex post facto, there can be no doubt that much of the pepper might have been reshipped and sent on to London, and some of it was in fact sent on by the purchasers in steamers, and it fetched a good price in this country; but it was a matter of speculation in which the purchasers have been fortunate. The difficulties of the case arose from pepper not

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being an article frequently dealt with at the Cape, and this pepper was also of a kind not generally known, and of a quality which does not suffer so much by sea-water as ordinary pepper. But the captain and those employed by him acted to the best of their lights, and no better advice could be obtained by the captain than that upon which he acted. I think also that no other communication with the owners of the pepper than that which was made was practicable; and on the whole I am of opinion that the captain and the defendants are not responsible for the loss which has been sustained by the plaintiffs by the sale of their cargo, and my judgment must be for the defendants, with costs. (1)

Solicitors for plaintiffs: *Hollams, Sons, Coward, & Hawkesley.*
Solicitors for defendants: *Pritchard & Sons.*

(1) The counter-claim of the defendants, for the full freight on the whole of the pepper delivered and undelivered, less the value realized by the sale of the portion of the pepper in question at the port of distress, is not dealt with in the above judgment, but as the plaintiffs admitted that, according to German law, full freight is payable on cargo necessarily sold short of the port of discharge. As judgment went against the plaintiffs on the main issue as to the necessity of the sale, they submitted to a decree, settled by consent, after considerable delay, in the Registry, involving the payment by them of the full freight and general average charges.

T. L. M.

[IN THE COURT OF APPEAL.]

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Admiralty—Salvage—Award—Grounds for an Appeal Court altering the Amount.

In salvage cases there is no rule binding a Court of Appeal not to interfere with an award, unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased if, after a careful consideration of the facts, and after giving every possible weight to the view of the judge, the Court is of opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress, or so small as to be unjust to the salvors.

APPEAL by the plaintiffs, the owners, masters, and crews of the steamship *Inverness* and of the steam-tugs *Flying Scud, Heather Bell,* and *Spurn,* from a judgment of the President (Sir James Hannen), dated December 11, 1890, in an action for salvage services rendered to the steamship *Accomac.*

The case is reported only on account of the expression of opinion by the members of the Court of Appeal as to the grounds upon which the amount awarded for salvage services will be increased or diminished.

The facts were shortly as follows:—

On November 1, 1890, the *Accomac*—an iron screw-steamship of 2509 tons gross and 1629 tons net register, manned by a crew of twenty-eight hands all told, with a cargo of pitch pine, from Pensacola for West Hartlepool—struck on the south-east part of the Outer Dowsing Bank in the North Sea, but got off with injury to her rudder. The weather at the time was fine, with a light breeze from the S.W. The fishing-smack *Albert Edward,* of 70 tons register, with a crew of five hands, came to her assistance, and made her trawl-warp, and then her chain-cable, fast to the steamer, with a view to enable the *Accomac* to steer herself; but the attempt failed. In respect of these services the *Albert Edward* made a claim for salvage which was consolidated with the other actions, and tried at the same time, and it was suggested, on the hearing of the appeal of the other salvors, that the attention of the Court below had been mainly directed

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to the case of this smack. There was considerable conflict of evidence as to what the services of the *Albert Edward* really were, and the question was also raised whether she was not bound by an agreement to receive 75*l.* In the result the learned President, on the ground that the smack had helped to cant the head of the *Accomac* round, and had afforded useful local knowledge to the master of the disabled steamer, awarded the sum of 180*l.* to the *Albert Edward*, and her owners did not appeal.

After the *Albert Edward*, the *Accomac* took the assistance of the steamship *Juno* to steer her, but the hawser parting, the *Juno* left her, and on November 2 the *Accomac* was lying, with her anchor down, about six miles S.E. of the Outer Dowsing buoy, flying the signal of distress N.C. and carrying the three balls denoting that she was broken down, when, about noon, she was sighted by the *Inverness*, an iron screw-steamer of 2251 tons gross and 1471 tons net register, with engines of 160 horse-power nominal and a crew of twenty-three hands, from Antwerp to the Tyne in ballast.

On getting near to the *Accomac*, which was rolling heavily broadside to the sea, the master of that vessel hailed the *Inverness* that her rudder was gone, and that he wanted to be towed to Grimsby or Hull. There was a strong breeze blowing from the W.S.W., and a confused swell making the *Inverness* roll heavily, but, with difficulty, owing to her being light and consequently high out of the water, a boat was lowered and pulled to the *Accomac* with the end of a rope, by which, after two journeys, first the wire hawser of the *Accomac*, and then a manilla rope, were hauled on board the *Inverness*, and made fast. The towage commenced at 2 P.M., the vessels being then about forty-six miles from the Humber. After about eleven hours, during which the *Accomac* sheered about very much, they approached the Spurn lightship, but whilst dodging about waiting for a pilot, the *Accomac* sheered so violently as to part both tow-ropes, and it being then too dark, and the sea too choppy, to get the ropes again on board the *Accomac*, both vessels anchored in twelve fathoms water, the Spurn lightship bearing W. by N. three miles. At 6.30 A.M. on November 3, as it was blowing hard from the N.W., with a heavy sea, it was not deemed prudent to attempt to

take the *Accomac* in tow again, and that vessel remained at anchor, whilst the *Inverness* proceeded to Grimsby Roads to engage tugs. From these roads the master of the *Inverness* telegraphed to his owners to send tugs from Hull, and at the same time dispatched a letter by the *Spurn* (a paddle-wheel steam-tug of 80 tons register and 31-horse power nominal, with a crew of four hands), to the *Accomac* to say that tugs were being sent.

About 2.30 P.M. on the same day, the *Flying Scud*—a paddle-wheel steam-tug of 100 tons register, with engines of 80-horse power nominal and a crew of five hands—was cruising off the Humber, and, sighting the *Accomac* at anchor, proceeded towards her, and agreed to lay by and assist in towing her into port. About 5 P.M. the *Heather Bell*—a paddle-wheel steam-tug of 81 tons register and 40-horse power nominal, with a crew of four hands—came up to the *Accomac*, and made a similar agreement. About half an hour afterwards, the anchor of the *Accomac* was weighed, and these two tugs commenced to tow her with their own ropes towards the Humber, which bore about W.N.W. seven miles. About an hour and a-half later the tug *Spurn* came up and assisted in the towage, until she got across the tow rope of the *Flying Scud*, and broke it, whereupon the *Accomac* anchored, after having been towed about six miles in three and a-half hours. At this time, when it was blowing hard, and was rough and dark, the *Champion*—a steam-tug of 142 tons register, 80-horse power nominal, and manned by a crew of five hands—came up and informed the master of the *Accomac* that she had been sent by the owners of the *Inverness*, and that three other tugs were coming; and accordingly, at 10.30 P.M., the *Torfreda*—a screw-tug of 125 tons register and 76-horse power—and at midnight the *Sussex*—a tug of 144 tons and 60-horse power nominal—arrived, and anchored for the night.

At 4 A.M. on November 4, preparations were made for towing, and, after some delay in weighing the anchor of the *Accomac*, the *Champion* made fast so as to tow on the starboard bow, the *Torfreda* on the port bow, the *Spurn* was lashed to the port bow, the *Flying Scud* to the port quarter, the *Sussex* to the starboard bow, and the *Heather Bell* to the starboard quarter. A third tug ordered from Hull, the *Lady Bute*, now came up, but her services

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were dispensed with, and at 8 A.M. the towage commenced. After four hours' towage, rendered somewhat difficult by the sheering of the *Accomac*, the latter vessel was brought to an anchorage near the lower beacon buoy in Grimsby Roads. The next day the wind blew hard from the N.W., and at 8.30 P.M. the services of the *Torfreda*, *Sussex*, and *Champion* were dispensed with, the owners of the *Inverness* paying nearly 200*l.* to the owners of these three tugs, besides a nominal sum to the *Lady Bute*.

The values were as follows: the salved vessel *Accomac*, 17,000*l.*, cargo 2400*l.*, freight 2738*l.*, total 22,138*l.* The salvors, *Inverness* 30,500*l.*, *Flying Scud* 1400*l.*, *Heather Bell* 800*l.*, and *Spurn* 1100*l.*

SIR JAMES HANNEN, President, held that the valuable nature of the services of the *Inverness*, and of that of the tugs, was substantially admitted, but that there was exaggeration in the evidence as to the state of the weather and as to the danger to the *Inverness*; and, after consultation with the Trinity Masters, he awarded the sum of 1000*l.*

On appeal—

1891. July 14. *Barnes, Q.C.*, and *J. P. Aspinall*, for the plaintiffs, the owners of the *Inverness* and the tugs. The sum awarded was insufficient, considering that one large valuable steamer and three powerful tugs were engaged in the salvage services, and that the salved steamer was large, and, with her cargo, of considerable value. The position of the *Accomac* at the time the *Inverness* came up was, if not one of immediate danger, at any rate of considerable peril, as she was a vessel of heavy draught of water, in a disabled condition, hemmed in by dangerons sandbanks, subject to the influence of strong tides, and exposed to any bad weather that might overtake her. The risk to the officer and men who manned the boat of the *Inverness*, and succeeded in carrying a rope to the *Accomac*, was considerable, as the *Inverness* being light, her height out of the water, combined with her rolling, rendered the lowering and hoisting in of the boat dangerous. The services lasted from the 2nd to the 5th November,

and involved the expenditure of over 60*l.* for extra coal, pilotage, and dock dues for going into the Humber, besides about 200*l.* paid to the owners of the four tugs engaged to assist, so that the award really amounts only to 740*l.* to be divided between four salvors, with the result that the owners of the *Inverness* would not get more than 300*l.* to compensate them for the services rendered by her, and for the straining and damage to her hull, machinery, and gear.

Sir Charles Hall, Q.C., and *F. W. Raikes*, for the defendants, the owners of the *Accomac*. The award is sufficient, as there was no exceptional difficulty, no great danger to the salvors, and no risk to life. The *Inverness* left the *Accomac* on November 3, and went to Hull, and never came back. All risk was practically over on reaching the Spurn lightship. After the *Inverness* left, the large tugs in fact did the work, the smaller did nothing, and six or seven miles was the extent of their towage. The weather at the time and the danger to the salved vessel are exaggerated. Her engines were not damaged, and she was constructing a jury rudder when assistance arrived. Practically, the services amounted to little more than ordinary towage, and before this Court will interfere with the amount of the award, it must be satisfied that some important factor has been overlooked; but the whole of the evidence was gone into and duly appreciated. Unless the sum is absolutely unreasonable, this Court will follow the rule of the Privy Council, and not vary the amount: *The Lancaster.* (1)

LORD ESHER, M.R. We are advised that, considering the time of year, the place where she was, and her disabled condition by reason of having lost her rudder, the *Accomac* was in great danger. As the weather happened to turn out, there was not danger of her immediate total loss, but there was danger, if she had been left to her own resources, of being totally lost. We are advised that, considering her condition and her size, and the lightness of the *Inverness*, that the difficulty of the operation of saving the *Accomac* was great. It was so difficult that there was danger to the *Inverness*, being such a light ship, that she, by

(1) 9 P. D. 14.

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reason of the sheering of the other ship, might be herself driven on the sands. When we look at the judgment, we come to the opinion that the President cannot have appreciated, to the same extent that we do, the danger in which the *Accomac* was and the difficulty of the operation which had to be performed in order to save her. We have therefore come to the conclusion that the amount given by the President to the *Inverness* and to the tugs which aided in the salvage operations is unjustly too small.

It seems to have been urged that we are to act in these salvage appeals in accordance with the same rule that we act upon with regard to setting aside the verdict of a jury on a question of fact, viz., that we are not to interfere with it unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum. That is not the rule. If, after carefully considering the facts, and, after giving every possible weight to the view of the judge, we think it greatly in excess, and so greatly as to be unjust to the owners of the ship which had been in distress, we are bound to alter the amount by lessening it. In the same way, if, after having given that consideration to it which I have mentioned in the other case, and after having given all the weight which we think we can to the opinion of the judge who tried the case, we think the amount awarded to the salvors is so small as really to be unjust to them, we are bound to alter the amount. Considering the advice which has been given to us, we have come to the conclusion that the amount awarded by the President is so small as to be really unjust to the salvors in this case, and that it should be increased by 800*l.* We therefore allow the appeal, with costs, and alter the amount of the award from 1000*l.* to 1800*l.*

Appeal allowed.

BOWEN, and KAY, L.JJ., concurred.

Solicitors for plaintiffs, the owners of the *Inverness* and tugs: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

Solicitors for defendants, the owners of the *Accomac: W. A. Crump & Son.*

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Nov. 3.

Admiralty—Practice—Costs—Refreshers to Counsel—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 48—*Discretion of Taxing Officer.*

By Order LXV., r. 27, sub-r. 48, of the Rules of the Supreme Court, 1883: "As to refresher fees, when any cause or matter is to be tried or heard upon vivâ voce evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired, the following fees . . . ."

A trial extended over two hours and a quarter on the first day, and five hours and a half on the second day. On taxation of costs, between party and party, refresher fees were allowed to the counsel of the successful party in respect of the last two and three-quarter hours on the second day.

On objection to the taxation:—

Held, that the taxing officer had a discretion to allow some refresher fee for any time during which the trial was substantially prolonged beyond five hours.

Walker v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) dissented from.

APPEAL by plaintiffs from the refusal of the assistant registrar to review his taxation in respect of refresher fees allowed the defendant's counsel.

An action of damage by collision between the owners of the steamship *Wild Rose* as plaintiffs, and the owners of the steamship *Courier* as defendants, was commenced in the Admiralty Division before Jeune, J., with two of the Elder Brethren of the Trinity Corporation as assessors, at 2.5 P.M. on July 8. The vivâ voce examination of witnesses was not concluded at 4.20 P.M., when the Court rose. The case lasted the whole of the following day, from 10.30 A.M. until judgment was pronounced in favour of the defendants with costs, at 4 P.M.

The time occupied was therefore, on the first day 2 hrs. 15 mins., and on the second day 5 hrs. 30 mins., total 7 hrs. 45 mins.

On taxation of costs, between party and party, the leading and junior counsel for the defendants were allowed a refresher fee in respect of the time over the first five hours.

Loehnis, for the plaintiffs. The defendants are not entitled to recover the refresher fees allowed their counsel as under

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Order LXV., r. 27, sub-r. 48 (1) of the Rules of the Supreme Court, 1883; a right to a refresher fee can only arise where a trial has lasted a clear day beyond the first five hours. In this case the trial occupied less than five hours on the first day, and was not prolonged into a third day, and therefore the taxing officer had no discretion to allow a refresher. This is the interpretation put upon the rule in *Walker* v. *Crystal Palace District Gas Co.* (2), which is a decision in the Queen's Bench Division binding on this Court. The assistant registrar, in answer to the objections filed (3), relies upon the case of *Gibbs* v. *Barrow* (4),

(1) By Order LXV., r. 27, sub-r. 48, of the Rules of the Supreme Court, 1883: "As to refresher fees, when any cause or matter is to be tried or heard upon vivâ voce evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired, the following fees . . ."

(2) [1891] 2 Q. B. 300.

(3) The objections to the taxation filed by the plaintiffs submitted "that under Order LXV., r. 27, sub-r. 48, and the decision in the case of *Walker* v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300), the defendants were not entitled to recover the refresher fees paid their counsel, seeing that the hearing of the case only lasted from 2 P.M. to 4 P.M. on July 8, and the whole of the day on the 9th."

To these objections the assistant registrar, as taxing officer, answered:—

"I am unable to alter the taxation on this point. Considering the question first of all apart from authority, I think that the words 'for every clear day' must be read with the scale of fees which follows—that is, in other words, for every clear day subsequent to that on which the five hours have expired, there may be allowed fees not larger than those stated; but for a shorter time than a clear day, which I take to be a day of five hours, there may be given a smaller amount than the maximum, otherwise there would be this anomaly, that for a clear day there may be allowed a refresher, whereas for a day of four and a half hours over and above the first five hours none would be payable. When authorities are considered, no doubt *Walker* v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) is opposed to this view. On the other hand, the case of *Gibbs* v. *Barrow* (30 Sol. J. 538) is opposed to *Walker* v. *Crystal Palace District Gas Co.* *Gibbs* v. *Barrow* was a decision (in chambers on appeal) of Grantham, J., after consultation with another judge of the Queen's Bench Division. Therefore, it seems to be an equal authority with *Walker* v. *Crystal Palace District Gas Co.*; but there are several Chancery decisions in accordance with the view I take, such as *Wicksteed* v. *Biggs* (52 L. T. (N.S.) 428), and *Boswell* v. *Coaks* (36 Ch. D. 444). I consider, therefore, that the weight of authority is in favour of the view I take of the rule, and therefore I allow a refresher.

(4) 30 Sol. J. 538.

and two Chancery cases, *Wicksteed* v. *Biggs* (1) and *Boswell* v. *Coaks* (2); but Wills, J., in his judgment in *Walker* v. *Crystal Palace District Gas Co.* (3), says with regard to conflicting authorities: "It is true that there are two so-called conflicting authorities, but of these one (*Gibbs* v. *Barrow* (4)) was a decision at chambers, while the case before Chitty, J. (*Collins* v. *Worley* (5)), is deprived of all weight because the cases decided before this rule are treated as authorities. I think, however, that they have nothing to do with the question, and that the rule was passed because of those cases. It is obvious, too, that the only point to which the attention of Chitty, J., was called was whether the period of adjournment should be included in, or excluded from, the computation of the five hours." The case of *Boswell* v. *Coaks* (2) does not apply, because North, J., allowed a refresher owing to there being a fresh start in the form of a re-hearing on another day after the case had lasted four and a half days. The case of *Wicksteed* v. *Biggs* (1) was exceptional, as, owing to the death of Jessel, M.R., the Court sat later than usual on the first day.

Barnes, Q.C., and *J. P. Aspinall*, for the defendants. Sub-r. 48 is a limiting rule, and prevents the taxing officer allowing more than a certain sum for a clear day; but the rule is not intended to do away with the old practice giving the taxing officer a discretion for periods less than one clear day in time after a clear day in time has elapsed. The second paragraph of the rule (6) shews that the intention is to treat the first five hours as a working day covered by the fee on the brief, and then there is a discretion left to the taxing officer as to allowing a refresher fee for any substantial prolongation of the trial beyond five hours. That the rule is not exhaustive, and that the old practice is not excluded, is shewn by the rule not applying to cases in the Court of Appeal: *Svendsen* v. *Wallace.* (7) So also the old

(1) 52 L. T. (N.S.) 428.
(2) 36 Ch. D. 444.
(3) [1891] 2 Q. B. 300.
(4) 30 Sol. J. 538.
(5) 60 L. T. (N.S.) 748.
(6) "The like allowances may be made where the evidence in chief is not taken vivâ voce, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid."
(7) 16 Q. B. D. 27.

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practice is expressly retained by sub-r. 30 for cases not specially provided for by the rules. According to that old practice, as stated in *Brown* v. *Sewell* (1), the question is whether an action tried on oral evidence occupies on the whole more than one day's sitting—that is, not an actual day, but one day in time, after which refreshers may be allowed. In that case, Jessel, M.R., followed his previous decision in *Harrison* v. *Wearing* (2), and this latter case was followed in *The Neera.* (3) In *Levetus* v. *Newton* (4) also, Chitty, J., allowed a term refresher on the basis of the old practice. The cases referred to in the reasons given by the assistant registrar for his decision are all cases since the rule came into force, and shew that there is a conflict of authority, and they support the contention of the defendants in opposition to the views of the two learned judges in *Walker* v. *Crystal Palace District Gas Co.* (5)

SIR CHARLES BUTT, President. This is a case which is not altogether free from difficulty. I am asked to decide it, not by such lights as I may find for myself, but upon authority. Although I have very considerable difficulty in agreeing with the reasons given by the learned judges of the Queen's Bench Division in the case of *Walker* v. *Crystal Palace District Gas Co.* (5), I certainly should have felt bound to defer, and should have deferred, to that authority had there been no cases conflicting with it. But there is manifestly a conflict of authority upon the point. Besides the equity cases cited, a case said to conflict, and which I think does conflict, with that authority, was decided in chambers by Grantham, J., after consulting, I am told, some other judge; but that is disposed of by the learned judges of the Queen's Bench Division who decided the case of *Walker* v. *Crystal Palace District Gas Co.* (5) They say that the decision of Grantham, J., was a decision in chambers, and no doubt decisions in chambers are apt to be given in a greater hurry than in matters which are fully discussed in court. But I cannot also fail to observe that it would appear from the report of

(1) 16 Ch. D. 517.
(2) 11 Ch. D. 206.
(3) 5 P. D. 118.
(4) 28 Sol. J. 166.
(5) [1891] 2 Q. B. 300.

the case of *Walker* v. *Crystal Palace District Gas Co.* (1) that the attention of the learned judges was not directed to a most important part of the rule under consideration, I mean the second paragraph, which runs: "The like allowances may be made where the evidence in chief is not taken vivâ voce, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used." That appears to me to tend strongly in favour of the construction Mr. Barnes asks me to put upon this rule.

I have already suggested to Mr. Loehnis, whose argument has certainly been of the greatest assistance to me in this matter, a point which I conceive to be not without difficulty in his way. It is this, that the argument which he has put forward, if carried to its logical conclusion, would land us in this state of things. If the trial of a cause began on the Monday, occupied four and a half hours on that day, occupied six hours on Tuesday, and four hours more on the Wednesday, no refresher fee could, on that view of the rule, be allowed at all by the taxing officer. That seems to me so irrational and unreasonable that I shall not give effect to it if I can avoid it. In the conflict of authority, although I feel the wording of the rule is doubtful, I shall adhere to the view upon which the assistant registrar has acted in this case, and hold that he is entitled to allow a refresher fee, I do not say the whole amount of ten guineas, but some refresher fee for any time during which the trial is substantially prolonged beyond five hours. In other words, I uphold the decision of the assistant registrar, and dismiss the appeal with costs.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

(1) [1891] 2 Q. B. 300.

1891
April 14.

CAREW *v.* CAREW.

Divorce—Alimony pendente lite—Respondent's Means—Partnership Books, Refusal to produce—Attachment—Rule 191 *Divorce Court Rules.*

In a petition by the wife for dissolution of the marriage, she applied for an allotment of alimony pending suit. The respondent in answer filed a balance-sheet, shewing a loss on his whole business for the year, and the registrar made an order on the respondent and his partner to produce their account books. They accordingly produced a ledger for the last year, but refused to allow it to be inspected.

The Court on motion *held* that the registrar had power under rule 191 to require an inspection of the ledger, and issued a writ of attachment to enforce compliance with his order.

MOTION for the issue of a writ of attachment.

This was a petition by the wife for the dissolution of the marriage on the ground of adultery and cruelty, and the respondent in his answer denied the charges.

On October, 30, 1890, the wife made an application for an allotment of alimony pending suit, which was in due course referred to the registrar. The respondent had filed a balance-sheet of his last year's business shewing a deficit. The registrar made an appointment for March 25, and issued a subpœna duces tecum directing the respondent and his partner, Mr. Vaile, to produce their books. The respondent and his partner, who were financial agents, attended before the registrar and produced one ledger relating to the last year's business, but they refused to allow it to be inspected. The registrar made an order granting inspection of the ledger, but the respondent and his partner failed to comply with it, without setting up any defence on the ground of privilege.

Crump, Q.C. (*Barnard*, with him), for the petitioner, moved for an attachment against the respondent and his partner, relying on rule 191. (1)

(1) The material words of rule 191 are as follows:—

"If he (the registrar) think fit, he shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents, or to call for affidavits, and shall direct such order to issue as he shall think fit, or refer the application, or any question arising out of it, to the judge ordinary for his decision."

Inderwick, Q.C. (*B. Deane*, with him), contrà. This is an interlocutory proceeding, and it is therefore not in accordance with practice nor with law that an order should be made on third parties to produce their books. The respondent's partner, Mr. Vaile, has no connection with the suit, and it would be hard upon him that he should be compelled to allow his partnership books to be inspected. At the hearing the judge may make what order he thinks proper, but while the case is in its preliminary stage there is no power to compel the inspection of documents such as these: *Hadley* v. *M'Dougall* (1); *Kearsley* v. *Phillips* (2); *Reid* v. *Langlois.* (3) This matter is only referred to the registrar for the purpose of making a temporary arrangement for alimony. The petitioner may never obtain a permanent order, but for the temporary purpose there are sufficient materials in the balance-sheet which has been furnished to the petitioner, and there is no necessity to inspect the partnership books.

[JEUNE, J. The rule gives power to the registrar to determine the amount of alimony, and for that purpose he may compel the attendance of witnesses, though they may not be parties to the action. He may also require the production of any documents. Does not that include power to require the production of documents of persons not parties to the action? How can he discover the amount of the husband's income except by the production of these books?]

The husband makes his answer as far as he is concerned. He has produced a balance-sheet of his accounts, and that is sufficient for the registrar to make a temporary order. What the petitioner is entitled to is a sufficient income to enable her to live in a suitable manner during the suit. There is a distinction to be drawn between alimony pending suit and permanent alimony.

Crump, Q.C., in reply. Order XXXVII., r. 7, gives power to order the attendance of witnesses in any cause or matter at any stage of the proceeding. The fact that Mr. Vaile is not a party is no answer: *Elder* v. *Carter* (4); *Jennings* v. *Jennings.* (5) The production of the partnership books is the only way by which

(1) Law Rep. 7 Ch. App. 312.
(2) 10 Q. B. D. 36, 465.
(3) 1 Mac. & G. 627.
(4) 25 Q. B. D. 194.
(5) Law Rep. 1 P. & D. 35.

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the petitioner can test the accuracy of the balance-sheet which shews a deficit. The registrar cannot fix the proper amount of alimony unless he has the books before him, and he was fully justified in exercising his discretion to require the production of this particular book.

JEUNE, J. The doubtful point here is one of discretion and not of law. As a matter of law the registrar undoubtedly has power to order the production of documents. Rule 191 appears to be clear on the subject. It gives the registrar power to investigate the averments in the petition for alimony in order to decide what the alimony shall be—he is armed with powers not only to call the husband before him, but to take the oral evidence of persons not parties to the proceeding who may be required to attend and give evidence vivâ voce, and he is also empowered to require the production of any documents which he thinks relevant to the inquiry. Then it is said he cannot order the production of these documents because this is an interlocutory proceeding; but the answer to that is that the rule 191 applies just as much to interlocutory proceedings as to any other, and in principle why should it not be so? There is a rule under the Judicature Acts (Order XXXVII., r. 7), passed for the purpose, when that rule is applicable, of compelling production of documents at any stage of proceeding.

Then the distinction is drawn by Mr. Deane that because this is a question of alimony pending suit and not of permanent alimony this evidence cannot be taken. I can find no ground for that contention, for although the inquiry need not perhaps be so exhaustive in the one case as in the other, still the nature of the inquiry is the same and the means by which you must pursue it must be identical. Something has been said on the authorities which bear on the question of discovery. I do not refer to them, because it seems to me that there must be a distinction drawn between them and the case of a subpœna duces tecum. The very reason why in certain cases you cannot obtain documents on discovery is because it is supposed that sufficient power is given to the parties to compel the production of documents at the hearing by a subpœna duces tecum. As to the relevancy of these

documents, this Court would not attach persons who refused the production of documents for inspection unless it had ground for supposing that they were proper documents to be inspected. I had considerable doubt about it here. It seemed to me that where a balance-sheet had been filed sufficient information had been given for fixing the amount of alimony. But when my attention is called to the balance-sheet itself I find that it shews an absolute deficit, and that I think fairly calls for further investigation into the respondent's income. On that ground, it appears to me that the ledger of the year ought to be produced, and that the registrar was right in requiring its inspection. I shall therefore grant this application, and I propose to allow the attachment to lie in the registry for ten days. During that time I hope that the document will be produced.

Solicitors for petitioner: *Valpy, Chaplin, & Peckham.*
Solicitors for respondent: *Robbins, Billing & Co.*

W. L.

FORSYTH *v.* FORSYTH.

Aug. 11.

Divorce—Variation of Settlements—Parties Domiciled in Scotland at time of the Marriage—Settlements in Scotch form—22 & 23 Vict. c. 61, *s.* 5.

The Court has power to entertain a petition for variation of settlements, although the petitioner and respondent were domiciled in Scotland at the time of the marriage, and although the settlements were made in the Scotch form.

Nunneley v. *Nunneley* (15 P. D. 186) explained and followed.

MOTION to confirm the registrar's report on an application for the variation of settlements.

The petition was by the husband for dissolution of the marriage on the ground of the wife's adultery.

The parties were married in Scotland, in 1876, and on August 6, 1890, the parties being then domiciled in England, a decree nisi was pronounced dissolving the marriage, and this decree was made absolute on February 17, 1891. There were two children of the marriage, a son aged eleven years and a daughter aged eight years.

The application to vary the settlements was made by the petitioner, and from the report of the registrar, to whom the matter was referred, it appeared that two settlements, both in the Scotch

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form, were made in contemplation of the marriage. One, described as the Scotch settlement, dealt with the property brought into settlement by the respondent, the other, described as the Ceylon settlement, dealt with the property brought into settlement by the petitioner.

The Scotch settlement included a sum of 100*l.* on deposit with the National Bank of India, a sum of 300*l.* in deposit with the New Oriental Bank Corporation, and a sum of 250*l.* on deposit with the Bank of New Zealand, none of which are Scotch companies. The rest of the property was situated in Scotland, or invested in Scotch securities. By this deed the petitioner resigned his jus mariti in all the property of the respondent, and undertook to maintain, educate, and clothe the children of the marriage. He also assigned to her in the event of her surviving him, all his household furniture and "replenishing." The respondent assigned all her property to trustees in trust to pay the income thereof to her for life as an alimentary provision, and after her death, to the children of the marriage, with special directions as to the application of income for their maintenance during their minority, and with power to her to dispose of the trust property in the event of her dying without issue who should attain the age of twenty-one or marry, and failing such disposition, the trust estate to belong to the petitioner.

The only property dealt with by the Ceylon deed, was the petitioner's moiety of an estate in Ceylon, which he assigned to trustees in trust for the respondent for her life, and after her death for the children of the marriage, and in default of children for the petitioner absolutely. There were special provisions in the deed for the payment of the income to the petitioner in the event of the respondent's death, and for the maintenance and education of the children during minority.

The trustees of the Scotch deed resided in Scotland, and of the Ceylon deed in Ceylon. The petitioner and the respondent appeared by counsel before the registrar, and agreed to a variation of settlements in the following terms:

Respondent to withdraw all claims that she may have against the petitioner or the trustees—both settlements to be varied by ordering the trustees to pay one-third of the income to the peti-

tioner for his life and for his own use—one-third to the petitioner for the maintenance of the children during minority and after each child shall attain the age of twenty-one years to pay one-sixth of the income to such child—and to pay one-third of the income to the respondent for her life. The income already due to be divided—one half to be paid to the respondent's solicitor in satisfaction of all claims that he has against the petitioner; the other half to be paid to the petitioner's solicitors and to be applied by them in paying the costs of all parties of this application, and the balance to be applied for the maintenance and benefit of the children; the charges on the trust premises to be paid off by the trustees, they having power to deduct 20*l.* per year from each of the shares of the petitioner, the respondent, and the children, until all the charges set out in paragraph 12 of the respondent's answer to the petition for the variation of settlements have been paid off.

These charges amounted to 629*l.* 11*s.* 10½*d.*, and consisted of loans and other personal debts contracted by the petitioner or respondent or by both of them jointly.

The trustees of the settlement appeared before the registrar and objected to the proposed variation on the ground that it did not adequately protect the interests of the children, and that, according to Scotch law, the interest of the respondent in the settlement being ipso facto extinguished by reason of the decree dissolving the marriage, the children were now entitled absolutely.

Barnard, moved on behalf of the petitioner that the settlements be varied in accordance with the agreement arrived at between the parties with this modification—that the interest of the petitioner be limited to the lifetime of the respondent. As to the jurisdiction of the Court to vary the settlement under s. 5 of the 22 & 23 Vict. c. 61, he cited *Nunneley* v. *Nunneley*. (1)

Durley Grazebrook, for the respondent, concurred.

A. Young, for the trustees of the Scotch settlement. In *Nunneley* v. *Nunneley* (1) Lord Hannen had no difficulty in varying the settlement because the domicil of the parties was English—but here their domicil was Scotch, and the deeds are in the Scotch

(1) 15 P. D. 186.

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form. If the settlement is varied it must be in accordance with Scotch law: *Duncan* v. *Cannan*. (1) By Scotch law the interest of the wife in the settlement is entirely extinguished as if she were dead: *Harvey* v. *Farquhar*. (2) It is doubtful whether any interest can be given to the husband, but the settlement cannot be varied to the detriment of the children: *Crisp* v. *Crisp*. (3) The trustees may be sued by the children's next friend.

Fooks, for the trustees of the Ceylon settlement.

Barnard, in reply. In *Nunneley* v. *Nunneley* (4) Lord Hannen held that in every case where a decree had been pronounced by this Court it had power to alter the settlement, although it might be in the Scotch form and made in Scotland. The question of the interests of the children was also considered there.

JEUNE, J. I think there is power in the Court to vary these settlements. *Nunneley* v. *Nunneley* (4) seems to me to decide that. It is true that in this case the parties seem to have been domiciled in Scotland at the time of the marriage, although they were domiciled here at the time of the divorce. Therefore if the domicil be Scotch it may be that the settlements are to be considered according to Scotch law. Assuming that to be so, *Nunneley* v. *Nunneley* (4) seems to me to go the whole length of deciding that whatever be the law applicable to the settlements, the effect of s. 5 of the 22 & 23 Vict. c. 61, is to give this Court power to vary the settlements in its discretion, according to the principles laid down in that section. It is true that in that case the parties appear to have had an English domicil. The learned judge mentioned the fact that the wife, being Scotch originally, acquired her husband's English domicil; but his language appears to me to shew clearly that the principle of his decision was that s. 5 of the 22 & 23 Vict. c. 61, gave power to vary the settlement, although it was Scotch, and was to be interpreted according to Scotch law. Then comes the subsequent question, Is there power to vary the settlements so as to deprive the children of their interest? I think there is not. *Crisp* v. *Crisp* (3) is conclusive to shew that the Court has no power to

(1) 23 L. J. (Ch.) 265.
(2) Law Rep. 2 H. L. Sc. 201.
(3) Law Rep. 2 P. & D. 426.
(4) 15 P. D. 186.

deprive infant children of any interest which they may have under the settlement. It follows, therefore, that the husband's interest must be carved, so to speak, out of the wife's interest—that no interest of his shall survive the wife's, and that the interest of the children shall remain the same as it was before. The order, therefore, will be to refer the matter back to the registrar to vary the settlements in accordance with the agreement, limiting the petitioner's interest to the lifetime of the respondent, and to settle the form in which the payment of the charges shall be carried out.

Solicitors for petitioner: *Ullithorne, Currey & Villiers.*
Solicitor for respondent: *Charles R. Taylor.*
Solicitors for trustees: *Ranken, Ford, Ford & Chester.*

W. L.

HURLEY *v.* HURLEY AND MENZIES.

Aug. 12.

Divorce—Costs—Husband's Petition—Jury discharged without Verdict—Full Costs of Hearing allowed to the Wife—Practice.

At the trial of a petition by a husband for divorce the jury disagreed, and were discharged without giving a verdict. The Court, upon the application of the wife, made an order that her costs of the hearing should be taxed and paid in full, and refused to limit such costs to the amount deposited in Court.

THIS was a petition by the husband for a dissolution of the marriage on the ground of his wife's adultery. The case was heard before Collins, J., and a special jury, and the jury not being able to agree on a verdict were discharged.

Bankes, moved, on behalf of the respondent, for an order that her full costs of the hearing should be taxed and paid to her. The invariable practice of this Court is to give full costs to a wife who has succeeded, or where, as in the present case, she has not been proved to have been guilty of the offence charged against her. There is no rule applicable to a trial which has become abortive, owing to the disagreement of the jury, but such a trial ought to be dealt with on the same principle as an interlocutory proceeding. It is a stage in the case, and the wife is entitled to the costs of it. The primary object of fixing the

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amount, and depositing it in the Registry, is for the security of the wife, and though a practice has grown up where the wife is found guilty of limiting her costs to the amount paid into Court, it has no application to this case.

Durley Grazebrook, for the petitioner. The wife is not entitled to more than the amount paid into Court. If there is a new trial she may make a fresh application for additional costs.

COLLINS, J. I think the wife is entitled to the order asked for. The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice has been for the Registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much the better for the wife; but if his estimate is found insufficient when the trial comes on the practice is to enlarge the amount paid in by the husband, so that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. The practice, therefore, seems to me to be that the husband is bound to furnish the estimated amount for the wife's costs entirely independent of the result. There has been an exception engrafted on that rule that, if the result of the litigation turns out to be unsuccessful for the wife—if she is found guilty—the Court refuses to enlarge the amount which has been deposited. Where that practice comes from I do not know, but it only comes into consideration when the wife has been found guilty, which is not the fact here. In this case we are in the same position as if the trial had gone on, say for fourteen or fifteen days, and application had been made to enlarge the fund deposited for the purposes of the litigation. The wife still remains a wife, and she is entitled to recover from her husband the costs of the litigation. I, therefore, make an order that the wife's costs be taxed and paid—the amount not to be limited to the amount paid into Court.

Solicitors for the petitioner: *N. Argles & Co.*

Solicitors for the respondent: *Lewis & Lewis.*

W. L.

COOPER (FALSELY CALLED CRANE) *v.* CRANE.

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Aug. 11, 12.

Nullity of Marriage—Coercion—Incapacity to Resist—Intimidation—Fraud—Free Will—Consent.

In a suit by a woman for declaration of nullity of marriage, it appeared that the petitioner and respondent were Americans and cousins—the petitioner at the time of the ceremony hereafter referred to being twenty-four, and the respondent under twenty-one years of age.

The respondent had made an offer of marriage to the petitioner, which she had refused, and on a Sunday in July, 1888, under the pretence of going to the afternoon service at St. Paul's Cathedral, he took her to St. Bride's Church, Fleet Street, and outside the church said to her suddenly, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." According to her own statement she was so alarmed that she did not know what she was doing, and went into the church, where the ceremony of marriage was performed, and she signed the register. The respondent had previously obtained a licence, on a false declaration as to his own age and as to the petitioner's residence, and had made arrangements at the church for the marriage to be performed that day.

The Vicar of St. Bride's, who performed the ceremony, stated that the petitioner went through it without shewing any signs of unwillingness, repeated the responses in an audible tone, and signed the registry in a clear, firm hand. After the ceremony the respondent took the petitioner home, and left her at the door of the house. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins and not as husband and wife. The petitioner never told her parents or friends of the marriage, because, as she said, she did not regard it as binding.

The respondent, who did not appear in the suit, admitted that he had only married the petitioner for her money, and that he did not care for her. There was evidence that the petitioner was of a weak, impressionable character, with not much power of resistance to a stronger will, but that she was not particularly disposed to fall into a hysterical state in the medical sense of the term:—

Held, that the facts were insufficient to rebut the presumption of consent; that the marriage was valid, and that the suit must be dismissed.

THIS was a petition by Alice Beverley Crane (otherwise Cooper), praying for a decree declaring a ceremony of marriage between her and the respondent, solemnized on July 8, 1888, to be null and void.

In paragraph 3 of her petition, the petitioner alleged that "your petitioner never consented to the said pretended marriage, and

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at the time when the said pretended marriage was performed she did not believe it constituted an effective marriage."

In paragraph 4, she alleged that "the petitioner was induced to become a party to the said ceremony of marriage through fear, terror, and duress of the said Walter Beverley Crane, and not of her free will."

In paragraph 5, she alleged "that the said Walter Beverley Crane procured the celebration of the said marriage by fraud, such fraud being as follows: The said Walter Beverley Crane invited your petitioner to accompany him to a service in St. Paul's Cathedral, and, without the knowledge of your petitioner and by false statements on oath, obtained a licence for the solemnization of a marriage ceremony, and without her knowledge he made arrangements for the solemnization of such ceremony at St. Bride's Church in Fleet Street."

The case was heard before Collins, J.

Sir H. James, Q.C. (*Inderwick, Q.C.*, and *Searle*, with him), for the petitioner.

The respondent had filed no answer, and did not appear.

From the evidence of the petitioner it appeared that the parties were cousins, and both natives of the United States: the petitioner being twenty-four years of age at the time of the ceremony of marriage and the respondent under twenty-one. The petitioner left the United States in 1873, with her mother, and since that time had resided with her on the Continent, chiefly in France and Switzerland. In 1886 and 1887 they were living in Paris, and subsequently at Pau, and at both places they were visited by the respondent and his father. After a stay of some months at Pau the respondent was left by his father in charge of the petitioner's mother, and remained there until the month of May, 1887. In the spring of 1888 the petitioner had an illness at Pau, and in June she was sent with her maid for a change of air to London, where she lived for some time at Notting Hill, with a relation of her stepfather, and afterwards went into lodgings. The respondent visited her here, and proposed marriage to her; but she thought he was joking, she being five years older than he was, and she refused him. On July 6, he paid her a visit,

and asked her to accompany him to the afternoon service at St. Paul's Cathedral, which she agreed to do. He called on the Sunday, which was July 8, and took her out in a hansom cab. While on their way he offered her some "sweets," but having tasted one or two she did not like them, and took no more. In Fleet Street he stopped the cab, and they got out, he saying they were close to St. Paul's, and they would walk the rest of the way. They then walked towards a church which she thought was St. Paul's, but which she now knew to be St. Bride's Church, when he suddenly stopped and said to her, "You must come into this church and marry me, or I will blow out my brains, and you will be responsible." She knew he was in the habit of carrying a revolver, and had threatened to commit suicide, and she was frightened. She did not know what she was doing. She walked up the church, and went through a sort of ceremony. She remembered seeing a green cloth, and signing a book, but she did not remember whether there was a wedding-ring. She did not recollect a ring being produced, and she never had one. She saw that in the certificate she was described as living in St. Mary's, Islington, but she had never lived there, and she was living at Notting Hill when the marriage was celebrated. When the ceremony was over the respondent accompanied her back in a cab to her lodgings, and she parted with him at the door. The marriage was never consummated, and she had never seen him since. She had corresponded with him, but he always addressed her as "cousin," and never as his wife. She had never made any claim on him as his wife, and had never held herself out as a married woman either to him or to any one else. She never believed she was married, because she thought more formalities were required to constitute a marriage, and the first time she had heard that it was a valid marriage was in December of last year, when the respondent's father sent over the marriage certificate to her mother.

In answer to questions put to her by Collins, J., the petitioner said she was in such a dazed condition at the time that she did not know what she was doing. She did not remember a ring being put on her finger. She supposed she knew it was a marriage ceremony she was going through, but she did not

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think it was binding. For that reason she did not tell her friends what had happened when she got back, and she had never told her mother.

The depositions of the petitioner's mother were read, in which she stated that the first intimation she had of the marriage was by a letter from the respondent's father in New York, enclosing a copy of the marriage certificate. She shewed it to her daughter, who then told her of the marriage ceremony, saying at the same time that she did not think it was binding. She regarded it as a plot for getting possession of her daughter's fortune, as the respondent's father, when he was in Europe, had made enquiries about her expectations. Her daughter had always been of a peculiar temperament, of a very nervous disposition and hysterical.

Dr. Amédée Pomier, examined on commission, stated: "I know Alice Beverley Cooper, the petitioner in this suit, and have attended her professionally for the last five years. About three years ago I attended her for neuralgic pains, but not for articular rheumatism. She also had lumbago. I have always known her to be habitually anæmic. I have observed at different times in Miss Cooper palpitations of the heart, but the heart trouble of which she complained appeared to me to be of a nervous nature, depending upon her habitually anæmic condition and not owing to any rheumatic pain. This is constitutional with her. I have never noticed in Miss Cooper any positive signs of confirmed hysteria, but she appeared to be impressionable, with neurotic symptoms badly defined." In answer to the question: "Is Miss Cooper a person who, from what you know of her, would be specially likely to become unnerved or to fall into a hysterical state with loss of volitional power under the circumstances in which she was induced to go through the ceremony of marriage, as stated in her petition?" Dr. Pomier replied: "From what I know of her I cannot absolutely say that she is particularly disposed to fall into a hysterical state in the medical sense of the word. At the same time I do not hesitate to answer that, as far as the question of her will is concerned, Miss Cooper has always appeared to me to be of a character rather weak, without much power of resistance and easily overpowered by a stronger influence."

The Rev. E. C. Hawkins, vicar of St. Bride's, stated that he had performed the marriage ceremony on July 8, but the only circumstance by which he could distinguish it in his recollection was that when the parties signed the register, he had remarked that each of them had the Christian name of "Beverley," and one of them, he could not remember which, replied, "We are cousins." In reply to Collins, J., he said that nothing occurred to suggest that the lady was unable or unwilling to go through the ceremony; she repeated the responses in an audible voice, and signed the register in a clear, firm hand.

Mr. J. A. P. Ingoldby, of the firm of Ingoldby & Adkin, the petitioner's solicitors, stated that he had served the respondent with a copy of the citation and the petition in New York on March 13, 1891. The respondent at first refused to accept service, but afterwards said, "I will run down to Illinois and get a divorce from her there on the ground of desertion." Later on, he said, "I thought she had money, that is why I married her. I did not care a d——d cent for the girl when I found she had not any money. I did not want her;" and he added, "What do you think I would marry an old woman for, except for her money?" At a later interview he admitted that he had left the petitioner at the door of her lodgings without seeing her again, and that the marriage had never been consummated. He also acknowledged that he was under twenty-one at the date of the marriage. At a subsequent interview with the respondent, at which his father was present, he asked for some consideration for not defending the suit. He said, "Let Alice" (the petitioner) "give me one of her 'lots'" (meaning building lots, which formed part of her estate), "and I will see it all fixed up for you." Subsequently the respondent's father asked for $500 to come over to this country to arrange the matter.

Evidence was also given to shew that on July 7, 1888, the respondent made arrangements with the verger at St. Bride's for the marriage on the following day, and also that he had obtained a special licence describing himself as being of full age, and giving the residence of the petitioner as being in St. Mary's, Islington.

Sir H. James, Q.C., for the petitioner. The case is not submitted

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to the Court as one in which the petitioner was unaware of what she was doing. On the contrary, she has admitted that she knew that she was going through some sort of marriage ceremony; but the question is whether she was acting of her own free will in taking a part in that ceremony, or whether she was overborne by the superior will of the respondent; and whether she was affected by his superior strength of will to such an extent as to pass through that ceremony—which she would not have consented to do voluntarily. She was entirely passive. She took no part in procuring the licence, and she was no party to any of the preparations made for the marriage. She had already refused the respondent's offer of marriage; there was no motive why she should change her mind so suddenly; she had no intention of marrying her cousin, and she had no knowledge that she was going to be married. It was, therefore, altogether improbable that she would have gone through the ceremony of her own free will, or unless she had been coerced by the respondent's conduct. No motive why she should voluntarily change her previous decision is suggested in the case. It is shewn that she was of an impressionable character, likely to yield to a stronger will, and the stronger will was exercised on her by the respondent's violence, and by his threat to shoot himself, so that she was coerced into doing that which she would not have done voluntarily. All that happened after the ceremony shews that this was the case. She returned at once to her own home; she never thought that her cousin was her husband; she never suggested that he was her husband; and she never remonstrated against being left to herself. Her conduct was not that of a willing wife, and both parties acted upon the view that it was not a real marriage. She never at any time gave that consent to the marriage ceremony which alone could make it a valid marriage. In *Scott (falsely called Sebright)* v. *Sebright* (1) there was a threat of personal violence and the fear of bankruptcy, and there it was held that where the consent given is procured by means of threats which affect the will of the person who gave the consent, it is not that consent which is required to give effect to a marriage contract. In that case the proposition in Bishop

(1) 12 P. D. 24.

on the Laws of Marriage and Divorce, vol. i. p. 211, was cited, that inasmuch as matrimony must be contracted with full and free consent, if a woman void of courage and resolution is in such a state of mental terror as not to know what she is about, while another more heroic would have remained undaunted, still there is the same want of consent to a marriage as though she possessed firmer courage or was overawed by a more imminent danger; and the principle on which the learned judge decided that case is expressed in these words: "Whenever from natural weakness of intellect, or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect or more robust courage yielding to a more serious danger."

Here it is not a question of whether the petitioner knew what she was about, but what the Court has to determine is whether what happened did not operate to coerce her into doing something which she would not have done of her own free will, and the medical evidence shews that she was more likely to be influenced than a person of stronger character. When the petitioner did not mention what had occurred to her mother, it was not from a desire to keep it back, but because she had been hurried into this proceeding, and did not believe it to be binding. The subsequent conduct of the respondent shews that he would be likely when he had been rejected to insist upon having his own way, and, in order to obtain it, to resort to threats and violence. [He referred also to *Harford* v. *Morris* (1); *Wilkinson* v. *Wilkinson* (2); *Turner* v. *Meyers*. (3)]

Cur. adv. vult.

COLLINS, J. In this case the petitioner claims a decree of nullity of marriage on certain grounds stated in her petition. [Having read the petition and the petitioner's evidence, the learned judge proceeded:—] On these facts, is the petitioner entitled to a decree? On the one hand, it is clear law that if she did not in

(1) 2 Hagg. Cons. 423. (2) 4 N. of Cas. 295.
(3) 1 Hagg. Cons. 414.

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fact consent to the marriage the Court will declare it null. On the other hand, when a person of full age and of sound mind has gone through the ceremony of marriage publicly in the presence of witnesses who discovered nothing in her demeanour to suggest constraint, and has herself complied with the formality of signing her name and answering questions without apparent difficulty or confusion, very clear and cogent evidence must be given before the presumption of consent can be rebutted and the marriage annulled. In this case, after the admissions made by the petitioner in answer to questions put by me, and after the evidence of Mr. Hawkins, the clergyman who performed the ceremony, it cannot, I think, be contended, and Sir Henry James did not contend, that she did not understand that she was going through a marriage ceremony, or failed to realize what she was doing. She did in her evidence suggest that she thought that for technical reasons it would not be binding; but she knew that the respondent intended it to be binding, and the fact that she thought she might take some technical objection to its validity seems to strengthen the inference that she went through the ceremony realizing what she was doing and consenting to do it, but hoping that when done she might be able to avoid it. But, as I have already said, no argument was addressed to me that, assuming unconstrained assent, the marriage could be avoided because she was under a misapprehension as to the full legal consequences of the ceremony; nor do I think any such argument could prevail. The next point urged before me was that the facts shewed that her will was overmastered by the influence of the respondent, and that there was, therefore, no real contract. In order to hold that the ceremony so performed was not binding, I think I should have to infer as a fact one of two things—either that she was so perturbed by terror that her mind was unhinged, and she did not understand what she was doing—and this, I think, is what is meant by the words "not know what she is about" in the passage from Bishop, cited in the argument, and which is based on *Fulwood's Case* (1)—or that though she understood what she was doing her powers of volition were so paralyzed that, by her words and acts, she merely gave expression to the will of the respondent,

(1) Cro. Car. 482, 488, 489.

and not her own. I think the first of these alternatives is negatived by the evidence. As to the second, I think I should be carrying the doctrine of coercion to a dangerous length and further than any case has hitherto carried it if I held that the facts here supported it. The lady gave her evidence before me with perfect propriety and self-possession. The evidence of extraordinary sensibility on her part is not strong, and there is no evidence of extraordinary force of character in the respondent, then a young man of not quite one-and-twenty. The medical evidence as to her temperament is short. [The learned judge read the evidence of Dr. Amédée Pomier.] The only threat proved in this case was one that the respondent would shoot himself, and it is not even suggested that a pistol was in fact produced, though the petitioner said she knew he carried one. In the case known as *Miss Field's Case* (1) the consent was procured by a threat not only to shoot the threatener himself but also the young lady's lover; and, though the husband in that case was fifty-two, and almost in the position of guardian of the young lady, who was only eighteen, Lord Devon, with the concurrence of Lord Cottenham, Lord Lyndhurst, and Lord Denman, refused to move the second reading of the Bill to dissolve the marriage. I am aware that little assistance is to be derived from cases which merely depend on inference from facts not absolutely identical; but the case is at least an illustration of the rule that the strongest evidence is necessary to rebut the presumption of consent arising from going through the ceremony without complaint or apparent reluctance. Here there was no threat of violence to the lady herself, nor any such infamous suggestions as were alleged in *Sebright* (*otherwise Scott*) v. *Sebright* (2); nor is there evidence of prostration, mental and physical, in the lady, or of actual violence at the time of the ceremony, or of continuous remonstrance and annoyance on the part of the lady. Furthermore, the petitioner, after the ceremony, never disclosed the circumstances to her mother or to any one else until after the respondent's father sent the certificate from America, more than two years after the ceremony; and she continued in the meantime to correspond occasionally with the man who had so wronged her;

(1) 2 H. L. C. 48. (2) 12 P. D. 21.

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not, indeed, on the footing of husband and wife, so far as appears from the only letter produced, but upon friendly terms. The facts appear to me to fall very far short of those upon which Butt, J., felt able to act in that case. I am, therefore, compelled, with regret, to refuse the prayer of the petition. The conduct of the respondent has been marked by such cynical brutality, that I have felt, as Lord Devon felt in *Miss Field's Case* (1), the strongest desire to grant the petitioner the relief she asks for; but the principles which regulate the validity of solemn contracts must not be strained to meet hard cases, least of all when the contract in question is one of marriage. The prayer of the petition is, therefore, refused, and the petition dismissed.

Solicitors: *Ingoldby & Adkin.*

W. L.

May 12; *June* 20; *July* 25, 27; *Aug.* 11.

DE RICCI *v.* DE RICCI.

*Divorce—Agreement to Separate—Marriage Contract under French Law—Deed drawn by Registrar—Variation of Conditions of Contract—Powers of Registrar—*47 & 48 *Vict. c.* 61, *s.* 14.

In a suit by the wife for dissolution of marriage the parties at the hearing agreed on certain terms of separation which were made an order of Court, and it was referred to the registrar to draft a deed of separation embodying these terms with the usual clauses and with full power to determine all questions as to the form of the deed and all questions arising out of the terms of the settlement. The agreement, in addition to the usual conditions as to molestation, custody of, and access to children, stipulated that the husband should receive 250*l.* a year out of the annual income secured to the wife by the marriage contract, and that the husband should give up to the wife all articles of plate, jewelry, &c., belonging to her. The parties, being English subjects, had been married in Paris, and the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of the petitioner as her dowry should pay over to the husband and wife a sum of 200,000 francs, and that they should further pay an annuity of 30,000 francs for the benefit of the wife and her children, the same to lapse if the donors died before the recipient and the children of the marriage, and in the case of the death of the wife without children before her parents, they contracted to pay the husband an annuity of 12,500 francs. The contract also contained various conditions as to the investment and devolution of property acquired by the wife at and after her marriage, the power of disposing of

(1) 2 H. L. C. 48.

property moveable and immoveable by the husband and wife mutually in each other's favour, the mutual liability for debts contracted by either, &c.

The deed of separation prepared by the registrar proposed that the income of 30,000 francs secured by the marriage contract should hereafter be deemed to be the sole property of the wife, and that all real and personal property, moveable or immoveable, now belonging or hereafter accruing to the wife, should be her separate property, independent of the control of her husband, and that all such property not disposed of by her by will or gift should go to such persons as would have been entitled to it if the husband had died in her lifetime. It also required the respondent to relinquish all rights conferred on him by the marriage contract as to the investment of property acquired by the wife after marriage, and as to the rights of inheritance of the survivor to the property of the party who died first, and, finally, it stipulated that either of the parties should be at liberty to apply to the proper French tribunal for the ratification of the deed or of any of its provisions. The respondent refused to execute the deed on the ground that it was ultra vires as varying the conditions of the marriage contract, and on a motion under s. 14 of 47 & 48 Vict. c. 61, to nominate some person to sign the deed:—

Held, that, under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, and, also, whether an intention that separation of goods should not take place could be gathered from the agreement.

But, *held*, further, that the parties on signing the agreement, could only be taken to have intended that the deed should embody and carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband and wife and to the giving up by the husband of all articles belonging to the wife—and that the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract:—

Held, accordingly, that the deed must be referred back to the registrar to be reformed.

THIS was a suit for dissolution of marriage by the wife on the ground of her husband's adultery and cruelty. The respondent in his answer denied the charge, and made countercharges against his wife. There were five children of the marriage.

The case was heard on July 9, 1890, before Butt, J., without a jury, and a decree nisi was pronounced. The respondent did not appear at the hearing, but an application was subsequently made on his behalf on affidavits from which it appeared that his absence was due to a misunderstanding between the solicitors of the parties as to the day which had been fixed for the trial, and the Court granted a re-hearing of the case.

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At the re-hearing an agreement was come to between the parties on the following terms:—

1. Cause to stand over for execution of deed of separation with usual clauses.

2. On execution of deed the cause to be dismissed by consent, each party paying his or her own costs. Jury discharged.

3. All charges against the wife absolutely withdrawn.

4. The wife to have the custody of all the children, and those not now in her possession to be delivered to her forthwith.

5. The husband to have such access to the children as may be agreed on, or, in case of difference, shall be determined by the registrar.

6. The husband to receive payment of 250*l.* a year out of the income payable under the marriage contract by M. Montefiore (the petitioner's father), the residue of the same income to be paid to the wife.

7. The husband to give up to the wife all articles of plate and jewelry belonging to her, and in case of difference the registrar shall determine what articles shall be given up.

8. The wife to be at liberty to live in the United Kingdom, or abroad as she may desire, and to have her children with her.

9. Usual clauses as to molestation. All questions as to the form of the deed, and all other questions arising under these terms of settlement to be determined by the registrar.

10. These terms to be made a Rule of Court.

The matter was referred to the registrar to settle a deed of separation carrying out the above terms, but, in dealing with questions of French law, which arose in the case, the registrar, with the consent of both parties, called in the assistance of an English barrister, as assessor. The parties were married in Paris, and the material clauses of the marriage contract were as follows:—

1. The future husband and wife, both of whom remain English subjects, declare, notwithstanding, that they adopt the French law as ruling the civil conditions of their marriage, without however wishing to modify or restrain within the limits of French law the power which the English law gives them of freely disposing of their property, whether in regard to each other, or in

regard to their children; but the future husband under the marriage agreement, renounces his right to dispose of more than half the property which he may have to bequeath (dépendant de sa succession), in favour of the child born of his first marriage.

2. The future husband and wife declare that they marry without community of goods, in accordance with the terms of arts. 1530–1535 of the Civil Code. In consequence, they will not be held responsible for each other's debts and mortgages prior to the celebration of the marriage, nor for those which might be a charge, on property belonging to each of them. The rights of the future wife will be limited to the recovery whether in their original form, or in moneys, both of the goods and valuables brought by her in marriage, and of those which may fall, or come to her under successive donations, legacies, or otherwise. Respecting the future husband, he will have the right not only to his goods and present valuables, and to those which may fall or come to him under successive donations, legacies, or otherwise, but also to all the profits and economies made during the continuance of the marriage.

By art. 3, the husband declared that he married with all his property, the effect being to subject all his property to the provisions of art. 1.

By art. 4, the wife brought in marriage as dowry articles of personal property valued at 10,000 francs.

By art. 5, Mr. and Mrs. Montefiore, the father and mother of the petitioner, gave and contributed as a dowry to their daughter jointly:

1. A sum of 200,000 francs, which they bind themselves severally to pay over to the future husband and wife on the actual day of the marriage, the celebration of which constituted a receipt for the giver.

2. An annuity for life of 30,000 francs payable every three months, commencing from the day of the celebration of the marriage. This annuity contributed for the benefit of the future wife and of the children born of this union which can in no case be required to be repaid to the estate of the donors, and which lapses in case the donors die before the recipient and the children born of the marriage, gives to the survivor of them, but only in

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case of children existing born of the marriage, one quarter without reservation (en pleine propriété), and one quarter in usufruct of the chattels belonging to the person dying first on the day of his or her death.

Art. 7 provided that the husband should make an exhaustive statement of moveable property belonging to the wife, so as to facilitate restoration to her when the occasion might arise.

Art. 8 provided, that linen, plate, &c., bearing the mark of the wife, or her family, jewelry, diamonds, &c., for her personal use, should be deemed her property; but, as regards all other moveables, to the ownership of which the wife should not be able to prove a title, they should be held to be the husband's.

Art. 10 provided for the investment of the property which might come to the wife during marriage through inheritance, gifts, or legacies.

By art. 11 the future husband and wife agreed that the survivor of them should take, but only in case of children surviving issue of the marriage, one quarter absolutely and one quarter in usufruct of the chattels belonging to the one dying from the date of his or her death, and that the said survivor should not be obliged to furnish for the one quarter of which he or she might have the usufruct, nor to settle the quarter of which he or she took full possession.

Drafts of a proposed deed of separation were submitted to the registrar by each of the parties, and after hearing counsel and witnesses, the registrar prepared a deed of which the material clauses were as follows:—

6. The annuity of 30,000 francs payable under art. 5 of the marriage contract (subject to the provision hereinafter contained for payment thereout of the yearly sum of 250*l.* to the said James Herman de Ricci) shall belong to and be received by the said Helene Amelie de Ricci during her life as her separate estate independently of the said James Herman de Ricci; and she shall be at liberty and is hereby authorized at all times to receive and to give effectual receipt and discharges for the same, and to enjoy, administer, and deal with the same as fully and effectually as if she were sole and unmarried.

7. All real and personal, immoveable and moveable property

other than that hereinbefore specifically mentioned which now belongs or shall hereafter belong or accrue or devolve by succession, donation or bequest to or on the said Helene Amelie de Ricci, shall be her separate property, independently of the said James Herman de Ricci.

8. On the death of the said Helene Amelie de Ricci in the lifetime of the said James Herman de Ricci all her property, real or personal, immoveable or moveable, which she shall not have disposed of in her lifetime, or by will, shall, subject to her debts and engagements, go and belong to the person or persons who would have become entitled thereto if the said James Herman de Ricci had died in her lifetime.

By clauses 10 and 11, Mr. de Ricci was to renounce all rights conferred on him by arts. 10 and 11 of the marriage contract, and all other rights inconsistent with the provisions of this deed, and by clause 12 he was to receive the sum of 250*l.* annually out of the annuity of 30,000 francs during the lifetime of his wife or of her parents.

There were the usual clauses providing for custody of and access to children and against molestation, and finally, by clause 13, it was provided that either of the parties should be at liberty if so advised or, if occasion should arise, to make application to the proper French tribunal or court of justice for the ratification or recognition by such tribunal of this deed and of the provisions herein contained, and for that purpose the parties hereto agreed to submit to the jurisdiction of such tribunal or court of justice.

On March 20, 1891, the registrar made an order that the draft settlement be engrossed, and that it be executed by the parties within three weeks.

Mr. de Ricci refused to execute the deed, and application was made in Chambers for an order under s. 14 of 47 & 48 Vict. c. 61, that the deed be executed by some person to be named by the Court. The hearing was adjourned into Court, when two experts in the law of France were examined as to the effect of the marriage contract and the proposed deed of separation.

M. Jummier, doctor of laws, and a practising advocate at the Bar of Paris, examined on behalf of the petitioner, stated that

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the French tribunals would hold that the law applicable to parties married under the conditions of the first article of the marriage contract must be the law of their own nationality, and though the French law does not permit a voluntary separation by agreement between French subjects, yet if voluntary separation were permitted by the English law, the French tribunals would recognise such a separation between English subjects if not contrary to "public order," as being just as valid as if it had been pronounced by the French tribunals. A separation recognised by the English law as valid would be also recognised by French law as between British subjects. Although before 1884 divorce was not recognised in France, yet foreigners who had been legally divorced in their own country were regarded as divorced in France. By art. 311 of the French Code séparation de corps would bring about séparation de biens, and this would follow equally in the case of foreigners separated by a voluntary deed recognised as valid by the law of their own country. The word "dispose" in paragraph 1 of the contract must be taken in the sense of to give, and not to leave by will; for though the ordinary French law did not allow the wife to dispose of the property during her lifetime, it would recognise such a power in a marriage contract between English subjects if the English law permitted it. As long as the parties lived together the husband would have the administration of the property, but after separation the wife, according to the French law, would have the entire property in the annuity secured by the contract, and the husband would only be entitled to alimony to be fixed by the tribunals or agreed on by the parties. The wife would have the administration of the property, and all property coming to her either in the present or the future would be vested in her and at her disposal.

In cross-examination, M. Jummier said that though the French tribunals would not recognise a voluntary séparation de biens as between French subjects, they would regard séparation de biens as following on a voluntary séparation de corps as between English subjects which was valid by English law; but if the separation deed contained a condition that separation of goods should not follow separation of bodies, they would recognise that condition. If there were no agreement respecting separation of

goods the French law would understand that there was such a separation.

M. Gorroztarzu, a practising advocate at the French Bar, and counsel to the French Embassy in London, examined on behalf of the respondent, agreed with M. Jummier that the French law, though not permitting voluntary separation between French subjects, would recognise voluntary separation between foreigners, if valid by the law of their nationality, and would also recognise the operation of a voluntary separation to the same extent, but would not extend it beyond the limits of the agreement. If an English husband were entitled under an agreement of voluntary separation to a certain portion of the income of a fund belonging to the wife, the wife could not obtain an order from a French Court to allow her to receive the income, nor could her French creditors, and it could not be said therefore absolutely that séparation de biens followed always from séparation de corps. The French Courts would accept the English deed of separation as a whole, including the conditions inserted in it as to property, but would not give the parties rights which they did not possess under it or under their own law. The word "dispose," though a word of wide meaning, had been inserted in the contract with the intention of giving the parties a right to dispose of an unlimited quantum in favour of each other, but would not have the effect of allowing them to dispose of their property in a direction prohibited by the Code. Art. 1395 of the Code expressly provides that no marriage contract can be varied after marriage. By art. 311 of the Code séparation de biens followed on a separation de corps, but a question might arise to be determined by the French tribunals whether that referred solely to a decree of separation pronounced by the French Court or included a voluntary separation agreed on by the parties being foreigners whose law permits voluntary separation. In cross-examination, the witness said that if a question were to arise in France between English persons whether they were married or not it would be decided by the law of their own country, if that were not contrary to public order, or if they had not submitted themselves to French law on the question, but the French Courts would not be bound to enforce a foreign agreement, even if

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the parties agreed to submit it to the French Courts—unless a French subject were interested—a creditor, or a child.

Inderwick, Q.C. (*Rigby, Q.C.*, and *Solomon*, with them), moved for an order under s. 14 of 47 & 48 Vict. c. 61, that the deed be executed by some person to be nominated by the Court (*Howarth* v. *Howarth.* (1)) The respondent objects to the deed as being contrary to the marriage settlement; but the agreement at the hearing expressly provides that the registrar shall determine all questions as to the form of the deed and all questions arising under the terms of the settlement which were made a rule of Court. The proposed settlement embodies the terms of the agreement, and is a necessary consequence of that agreement. The registrar had full power to determine all the questions which have arisen, and it is not possible to go behind his award. [He referred to *Hart* v. *Hart.* (2)]

B. Deane, for the respondent. The deed of separation drawn up by the registrar is bad on the face of it. It is a variation of the marriage contract, which this Court has no power to make except in cases of dissolution of marriage. The marriage contract in the first article expressly states that the parties declare that they adopt the French law as ruling the civil conditions of their marriage, and by art. 1395 of the French Code the French Courts have no power to vary the marriage contract unless a decree of séparation de corps has been judicially pronounced. Therefore, neither the French Court nor the English Court has any power to vary the contract of marriage in this case. The registrar, by the terms of the agreement, was empowered to draw a deed of separation with the usual covenants, and if there had been no marriage contract what he has put into the deed might have been described as the usual covenants; but under the circumstances of this case the clauses of the deed are not usual. The deed is bad, because it does not recognise the conditions of the marriage contract, and that contract must be construed entirely by French law, except where a distinction is made in favour of English law, which is only in the first paragraph. Paragraph 6, which transfers to the wife

(1) 11 P. D. 68. (2) 18 Ch. D. 670.

the property in the annuity of 30,000 francs, is a direct violation of the marriage contract by which the annuity was payable to the husband, and according to French law would be administered by him. Under the proposed settlement, the wife might alienate the annuity, and the children of the marriage might be left without any provision. In like manner the other paragraphs of the proposed deed either vary or altogether annul the marriage contract. But by art. 1395 of the Code the conditions of a marriage contract cannot be varied after the celebration of the marriage. The proposed deed, instead of being drawn in accordance with the terms of the agreement, is an attempt to twist a voluntary separation into a judicial decree of séparation de corps and to follow it out by a séparation de biens. A voluntary separation is not recognised by the French law (art. 1443), and the French law will not enforce any condition of séparation de biens on a separation by agreement. [He also referred to arts. 306, 307, and 1530 to 1535 of the Code.] It has never been pretended that the parties when they signed the agreement had any idea that it was possible that the French law as to séparation de biens could be introduced into it, and nothing should be imported into the agreement which was not in the minds of the parties when they signed it. If it had been intended that a séparation de biens should follow the separation of bodies, the agreement would have provided that the fund should belong to the wife instead of assuming, as it does, that it is the property of the husband. If the whole fund was the property of the wife, what is the object of providing for her after-acquired property?

Rigby, Q.C., in reply. There is no real difference between the parties as to the effect of the French law. Though it does not permit voluntary separation by French subjects, it recognises that agreements may be entered into by foreigners valid according to the law of their own country, which bring about a status of separation. The parties, therefore, are legally separated, and the logical consequences follow. The parties, when they signed the agreement, must be taken to have consented to those consequences; and the registrar, in drawing up the deed, has inserted clauses which in his discretion he thought carried out those consequences. The deed merely carries out the agreement.

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There is not a single point in which the registrar is shewn to have mistaken the French law—there has been no miscarriage, and no ground shewn for setting aside the award.

[JEUNE, J. Where do you get the authority for the paragraph relating to the after-acquired property of the wife?]

From the French law which says that after a séparation de biens, all after-acquired property of the wife shall go to her without reference to the husband, whose rights are gone. The deed does not enable her to alienate such property, and her husband, though excluded from all beneficial interest, has a right to forbid alienation without a decree of the Court. The agreement does not affect the husband's ultimate position with regard to the immoveable property either in England or in France—all that it does is to take away his beneficial marital rights. As regards English law, the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), s. 91, provides that where a wife is living apart from her husband, the Court of Common Pleas may dispense with the concurrence of the husband in cases where his assent would be necessary, and there could also be an appeal to the French Courts to dispense with his assent.

[JEUNE, J. What, then, is the necessity for articles 10 and 11?]

They are inserted to put the husband in a position in which he would not be able to create litigation. They form part of the legal consequences of the situation in which the parties find themselves, and they are well within the functions of the arbitrator. In like manner article 13, which provides that either party shall be at liberty to apply to the French tribunal is inserted to make the deed effectual, and to prevent the husband refusing to come into the French Courts. There is no excess of jurisdiction in the deed—it carries out prudently and scrupulously the provisions of the arrangement, having due regard to the position in which the parties are placed by having submitted themselves to a certain extent to French law.

Cur. adv. vult.

JEUNE, J. The plaintiff and respondent, both of whom were British subjects, and the former at least domiciled in England,

were married in Paris. Before their marriage a marriage contract was entered into between them, to which the parents of the bride were parties. This contract regulated the marital relations of the parties by a curious amalgam of French and English law. [Having read the material portions of the contract as set out above, the learned judge proceeded:—]

In 1890, Mrs. De Ricci petitioned for a divorce against her husband on the grounds of cruelty and adultery. The charges were denied, and in the result, after some proceedings to which it is not necessary further to refer, an agreement (which the learned judge read) was drawn up, signed by Mr. and Mrs. De Ricci and Mr. Montefiore, and made a rule of Court. The matter came before the registrar for the purpose of a formal deed being settled. No evidence of French law was given, but it was, as I was informed, agreed by the parties that the registrar should have the assistance of Mr. Horne Payne in settling the deed.

The draft-deed prepared on behalf of Mr. De Ricci raised the question which underlies much of what is in dispute. That question is, what is the effect of the agreement signed by Mr. and Mrs. De Ricci on their status? On the part of the wife it is said that it constituted a séparation de corps in fact; that, by French law which governs the matter, as that is the law which regulates the civil conditions of the marriage, a séparation de corps entails a séparation de biens, and that therefore the deed must be framed so as to put into express words the pecuniary relations of the husband and wife on the basis of a séparation de biens having supervened on, and so affected, the provisions of the marriage contract. It was further said that, either by reason of the séparation de biens or of the express terms of article 1 of the marriage contract, the word *disposer*, applying to alienation inter vivos as well as bequest, the wife could grant, or could agree to grant, an annuity of 250*l.* out of the annuity otherwise entirely her own.

In the alternative, it is said it was for the registrar as arbitrator (I speak of him hereafter as the arbitrator) to determine whether this was a question for him to decide, or, if it was not, whether such séparation de biens was in fact and in law effected

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or not. On the other hand, it is contended, on behalf of the husband, that it is for the Court to say what were the questions for the arbitrator; that it was not a question for the arbitrator whether such séparation de biens was effected or not, and that on a true view of French law and of the agreement it was not effected.

The draft deed proposed on behalf of the husband carried out his view. It proceeded on the basis of the marriage contract remaining in force, and the condition of the parties under it being modified only, first, by the express provision in the agreement that the husband should receive payment of 250*l.* yearly out of the annuity of 30,000 francs payable under the marriage contract, the residue of the annuity to be paid to the wife; and secondly, by the provision in the agreement, as to the articles of plate and jewelry. It proposed, therefore, as regards the annuity, after reciting that the marriage contract remained in full force, to provide that the husband authorized the grantors, Mr. and Mrs. Montefiore, and they covenanted, so long as the deed remained in force, to pay out of the annuity 250*l.* a year to the husband and the remainder to the wife.

The deed, as settled by the arbitrator, with the assistance of Mr. Horne Payne, constituting the document with which I am asked to deal, clearly adopted the view put forward on behalf of the wife, and not that urged by the husband. It was obviously considered by its framers that a séparation de biens was effected, with the result (which, no doubt, on the evidence before me, is the effect of a séparation de biens according to French law on a marriage contract), that the property brought into the marriage contract by the wife, as to moveables at least, became at her disposition so absolutely that it may accurately be said to belong to her; and the deed is framed with the intention of expressing the effect of this change, not only as regards the provision relating to the annuity of 30,000 francs, but also with regard to most of the provisions of the marriage contracts directly or indirectly affected by it.

No question of misconduct in the arbitrator is suggested, nor of common mistake, or fraud, with regard to the making of the agreement.

There are, thus, therefore, I think, at once raised three questions for decision, two depending on French law, as to the effect of the agreement, and one on its construction—namely, first, whether the agreement to live separate, per se, effected a séparation de biens; secondly, whether such séparation de biens was brought about by an agreement to live separate, even if an intention to a contrary effect is expressed in or to be inferred from the terms of the agreement to live separate; and thirdly, whether an agreement that such a séparation de biens should not be effected is to be gathered from the terms of the agreement to live separate.

By whom are these questions to be decided? Is it for the Court or the arbitrator himself to say if they are questions for the arbitrator? If for the Court, are they questions for the arbitrator?

I do not know of any case in which the exact terms of reference employed in this instance have received adjudication. There are, however, two cases which illustrate the kind of language which gives rise to the more or less extended view of an arbitrator's powers. In *Willesford* v. *Watson* (1), the words "or touching these presents or any clause or matter or thing herein contained, or the construction thereof," were held to include not only the construction of the document itself, but also the question whether the acts complained of were or were not within the terms of the matters referred to arbitration. On the other hand, in *Piercy* v. *Young* (2), the agreement of reference was contained in the words, "any differences or dispute which may arise between the partners shall be settled by an arbitrator to be agreed upon between the partners, and his decision shall be final and binding upon all parties"; and it was held that it was for the Court, not the arbitrator, to decide whether the matter in question was one which the party proposing the reference had agreed to refer to arbitration. In this case, I think, the words employed leave it for the Court to say whether the questions which I have mentioned are within the reference to the arbitrator or not. Then, are they within such reference?

The material part of the reference to the arbitrator (for I do

(1) Law Rep. 8 Ch. 478. (2) 14 Ch. D. 200.

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not think the provision for a deed of separation with the usual clauses affects the question) is, "All questions as to form of the deed, and all other questions arising under these terms of settlement." It seems to me clear that the deed could not be framed without its being decided at the outset, one way or the other, whether the marriage contract remained in full force, or whether a séparation de biens had come about and affected it.

The provisions in the deed to carry out the stipulation affecting the annuity payable by Mr. and Mrs. Montefiore must, admittedly, assume totally different forms according as one or other view as to the existence of a séparation de biens prevails. I think, therefore, that even if the words, "all other questions," are to be taken as ejusdem generis with the "form of the deed" (and I doubt if they are so limited), the questions I have mentioned were questions for the arbitrator to decide.

It is not necessary for me to say whether if I had thought it was for me, and not the arbitrator to answer these questions, I should have answered them as he has.

I had before me two French lawyers, both, I think, from professional skill well qualified to express an opinion on French law. The one called on behalf of the wife, who had long been counsel to the family in this matter, stated the French law to be as follows: The French law does not allow of a séparation de corps between French subjects by agreement, it can only arise by decree of the Court; but between foreigners if the law of their country (subject to a limitation in favour of public order, which does not arise here,) allow of a separation by consent, irrevocable except by consent, the French law will look on that as a séparation de corps, and from such a séparation de corps a séparation de biens follows, even if the agreement for separation import that it should not follow. The advocate called on behalf of the husband assented to all, except the last of the above propositions. With that exception, the French law for the present purpose must be taken to be what the two advocates agree it is. But, in the view of the husband's witness, if the agreement for separation contained language shewing that a séparation de biens was not intended, the French Court would look on the agreement as a whole, and not hold that a séparation de biens was effected.

But is there enough in the agreement to shew that the parties did not intend their agreement to live separate to effect a séparation de biens? It may well be that on the husband's side at least there was no intention that the marriage contract should be almost entirely abrogated; and, no doubt, to hold that a séparation de biens with its legal consequences according to French law exists, brings about the strange result that whereas neither according to French law nor according to English law can a marriage contract in the ordinary form be varied by consent, in this case the marriage contract is practically abrogated at the will of the parties. It may, however, be said that there is hardly anything in the agreement which is not equally consistent with either state of things, that the provision as to the husband giving up the jewelry and plate does not negative a séparation de biens: and that, although the provision that the residue of the annuity of 30,000 francs is to be paid to the wife is superfluous if there be a séparation de biens, that may not by itself be enough to shew that it was intended to exclude a séparation de biens. I only state these points to shew the nature of the questions raised; as I have said, I think it was for the arbitrator to answer them. Assuming, then, that a séparation de biens, with its legal consequences according to French law, is in this case shewn to have been effected, it follows, I think, that the arbitrator had authority to decide what form the clauses in the deed to carry out clauses 6 and 7 of the agreement should assume, and it is not for me to consider whether he has not drawn them correctly.

I assented, during Mr. Rigby's argument, to his contention that all provisions and directions incidental to the necessary stipulations of the deed, though not themselves absolutely necessary, might not improperly be inserted, or, to use his phrase, that the obligations intended by the agreement might be written large in the deed. But the arbitrator has, I think, done much more than this. Anticipating questions which do not now arise, and which may never arise, he has elaborately worked out what he considers the effect of a séparation de biens on almost every provision of the marriage contract.

I cannot bring myself to think that he had any authority to

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do this. It may or may not be (I refrain from considering this question) that in each case he has taken a correct view of what the effect of the clauses of the marriage contract becomes in consequence of a séparation de biens; it may or may not be that the wife can before an appropriate tribunal enforce that view of the agreement, but as the parties have in their agreement selected two subjects only of the marriage contract for mention, namely, those referred to in clauses 6 and 7, I cannot think that it was intended that the deed should go on to deal with the effect of all the rest of the marriage contract.

It may, of course, be said that clauses 6 and 7 were inserted in the agreement solely because they modify what would otherwise be the result of a séparation de biens. But I do not think this explanation sufficient. Why was nothing said, for example, of any intention to avoid art. 11 of the marriage contract? It is by no means clear that that is the effect of a séparation de biens by itself—indeed, it was shewn by the French witness called by the wife that it is not, because he stated that whether it was avoided in favour of either party would depend upon the view taken by the Court of the conduct of the other party, and that in the present case it must be taken that both the parties were in fault (I do not know why), and so the clause should be avoided altogether. It is further to be remarked that the deed by no means deals exhaustively with the provisions of the marriage contract. All questions (and it was said there might be serious questions) as to the 200,000 francs are left open, and I think rightly so. The fact is, it appears to me, that the parties, by specially selecting the subjects referred to in clauses 6 and 7 of their agreement, meant to say that the deed must embody these provisions, and embody them in proper form, having regard to the pecuniary relations of the parties, but not that the other subjects of the marriage contract were to be dealt with. They are left, if ever dispute should arise upon them, to the general law and the decision of any competent tribunal on the evidence (including that of French law) brought before it. Objection was taken further generally to the clauses of release and to the clause of submission to the French jurisdiction. It seems to me right that there should be some such clauses in the deed, but that they

should be confined to what is necessary to give effect to the deed limited as I have held it should be limited.]

I think, therefore, that the matter must be referred back to the arbitrator to reform the deed in the sense which I have indicated.

Some points were raised as to the molestation clauses, but I think it was for the arbitrator to frame them in accordance with the 9th clause of the agreement, and it is not for me to consider the manner in which he has done so. This motion, therefore, must be dismissed, and the matter referred back to the registrar. Each party must pay his or her own costs.

Solicitors for the petitioner: *Bell, Brodrick, & Gray.*
Solicitors for the respondent: *Stokes, Saunders, & Stokes.*

W. L.

GOODDEN *v.* GOODDEN.

Aug. 12.

Judicial Separation—Petition by Husband—Wife found guilty of Cruelty—Agreement to pay Wife a weekly Allowance—Increase in Income of Husband—Application for increased Allowance—20 & 21 *Vict. c.* 85, *ss.* 17–32.

A husband having obtained a decree of judicial separation on the ground of his wife's cruelty, agreed to make her a weekly allowance of 2*l.*, and the agreement contained a clause providing that it should not operate as an estoppel, or to prejudice the right of either husband or wife to make an application to the Court for an increase in the amount of her allowance.

After the decree the income of the husband increased considerably, and the wife presented a petition for the allotment of permanent alimony:—

Held, that the Court has jurisdiction to make an order granting permanent alimony to a wife against whom a decree of judicial separation has been made for misconduct, and that it has also power from time to time to vary such order.

Application for permanent alimony.

In this case a petition for judicial separation had been presented by the husband on the ground of his wife's cruelty, which was heard on June 12, 1890, when the President (Sir J. Hannen) pronounced a decree of judicial separation, and gave the custody of the three eldest children of the marriage to the petitioner. The youngest child of the marriage was left in the custody of

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the mother, but since the decree she had returned it to the father. After the decree an arrangement was made, bearing date July 18, 1890, between the parties, by which the petitioner agreed to pay his wife an allowance at the rate of 2*l.* a week; and the agreement stipulated that it should "have regard only to the present means and position of the said Wyndham Charles Goodden (the petitioner)," and that it should not "act as an estoppel, or in any way operate to prejudice the said Wyndham Charles Goodden or the said Maude Brodie Goodden in any application which he or she may make to the Court for a variation in the amount of the allowance."

On June 6, 1891, the respondent presented a petition for the allotment of permanent alimony, and alleged that the petitioner, since the date of the agreement, had become possessed under the will of his uncle of considerable real and personal estate, and also that his professional income from his practice as a surgeon had increased.

The registrar before whom the application came originally refused to make any allotment of alimony, on the ground that the Court has no power to give alimony to a guilty wife. The wife appealed to the Court against this refusal, and

Newson, for the wife, moved for an order accordingly. In the earlier cases of *White* v. *White* (1) and *Dart* v. *Dart* (2), Sir C. Cresswell declined to make an order, in the absence of any precedent of such an order having been made in the case of a guilty wife, but Lord Penzance, in *Prichard* v. *Prichard* (3), overruled those cases, and suspended the decree until a provision had been made for the wife. In *Forth* v. *Forth* (4), he followed the same course. *Bradley* v. *Bradley* (5) is an authority that an order may be made after decree, and need not form part of it. Therefore the Court has ample jurisdiction to make such an order. There has been no such delay on the part of the wife as to deprive her of any rights which she may possess. She relied on the agreement under which she received a weekly allowance,

(1) 1 Sw. & Tr. 591.
(2) 3 Sw. & Tr. 208.
(3) 3 Sw. & Tr. 523.
(4) 36 L. J. (P. & M.) 122.
(5) 3 P. D. 47.

and she was satisfied with that until the husband's income was materially increased.

[JEUNE, J. Do you say that when the husband's income increased she had a right to an increase?]

Not an absolute right perhaps, but the agreement shews that the parties intended that the wife should not be precluded from coming into Court if the husband's income were increased. It shews, too, that they were of opinion that the weekly allowance was not sufficient for the wife if the husband's means increased. There is no reason why the allotment of alimony should not be made after the decree, more particularly where the wife did what she could to save expense by accepting an agreement instead of going into Court. Sect. 32 gives the Court power over the property of both parties.

R. H. Pritchard, for the husband. The Court has no jurisdiction to make the order as prayed. In *Prichard* v. *Prichard* (1), and in *Forth* v. *Forth* (2), Lord Penzance was aware that he had not the power to make such an order directly, and for that reason he took the course of refusing to pronounce the decree of judicial separation until some provision had been made for the wife. The point was considered by Sir C. Cresswell in *White* v. *White* (3), and *Dart* v. *Dart* (4), in both of which cases decrees had been pronounced at the suit of the husband, and in both of which the learned judge came to the conclusion that there was no precedent for an order to give alimony to the wife, where the husband has obtained a decree of judicial separation. The sections in the Divorce Act (20 & 21 Vict. c. 85), dealing with alimony on judicial separation are from 17 to 26; but they all refer to decrees on the wife's petition. By s. 17 the Court may make any order as to alimony which it may deem just where the application for decree is by the wife. By s. 24 the Court may direct a sum to be paid to the wife also on her petition, and s. 25 in like manner only refers to the petition of an innocent wife as is shewn by s. 7 of 21 & 22 Vict. c. 108, where it is provided that the wife's property as executrix shall be her property. Sect. 26 seems to be the only section in

(1) 3 Sw. & Tr. 523.
(2) 36 L. J. (P. & M.) 122.
(3) 1 Sw. & Tr. 591.
(4) 3 Sw. & Tr. 208.

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which the property of an innocent husband is dealt with, and that refers only to the contracts made by husband and wife after separation. All these sections must be read together as applying to the wife's petition only. The subsequent sections referring to the husband's property only apply to cases of dissolution of the marriage. The wife is in no worse position now than if she had obtained an order when the decree was pronounced. If the Court is pressed by the authority of the course taken by Lord Penzance in *Prichard* v. *Prichard* (1), and *Forth* v. *Forth* (2), it must be followed exactly, and the wife must be placed in the same position as she would have been if the decree had been suspended until a provision had been made for her. The agreement gives her no rights which she did not possess then.

Newson, in reply. The agreement distinctly contemplates that she might make a further application, and it was not intended in any way to compromise her rights to permanent alimony which the cases decided by Lord Penzance shew that she possessed.

JEUNE, J. I do not think the case depends on any statutory powers given to the Court. It is contended that s. 32 of the Act of 1857 applies not only to cases of dissolution of the marriage, but also to cases of judicial separation. I do not think that is so, not only because such interpretation is contrary to the statutory interpretation contained in the preamble to 29 & 30 Vict. c. 32, but also because the words "such decree" naturally refer to the last decree mentioned which is one for dissolution of marriage. I do not think s. 32 has anything to do with the matter, nor has s. 17, because that, as to alimony, is clearly limited to cases where the wife is the petitioner. So that it comes to this, was there a power under the practice of the Ecclesiastical Courts the continuance of which in cases of judicial separation is recognised by s. 22, to make an order for permanent alimony in cases where the husband was a successful petitioner for a decree of judicial separation? According to the earlier cases cited it would seem clear that there was no such

(1) 3 Sw. & Tr. 523. (2) 36 L. J. (P. & M.) 122.

power, and indeed in the later cases when the point was gone into nobody could produce an instance in which such a power had been recognised. Consequently Sir C. Cresswell, deprecating the maxim boni judicis est ampliare jurisdictionem, refused to make any such order. Then come the later cases where I cannot help thinking a material change was made. I do not see how the case of *Prichard* v. *Prichard* (1) can be got over. Nothing can be clearer than that the Judge Ordinary there intended to hold that where a wife had been guilty of cruelty and a decree of judicial separation had been pronounced against her, there was power in the Court to order a reasonable amount to be paid to her by way of alimony. The cases of *White* v. *White* (2) and *Dart* v. *Dart* (3) evidently proceeded to some extent on the principle that as the marital status continued, the wife retained the common law right to pledge her husband's credit for necessaries, and if, as was suggested, s. 26 of the Act of 1857 took away this common law right, it may perhaps be possible that it impliedly altered the rule as to alimony. Else the wife would be left to starve. But, however this may be, it is clear that Lord Penzance held he had the power in such a case to order permanent alimony. If there is power to make such an order on pronouncing a decree, what is there to prevent the Court making it after decree? I am inclined to think that the one follows the other. Unless there is some statutory limitation, it appears to me that, if the Court has power to make a provision for the wife a condition of the decree (to which decree the party is entitled of right), it cannot matter whether the order is made at the time of the decree or after. Nor should I, I think, be taking a correct view of Lord Penzance's decision, if I did not hold that, where a judge has power to make such an order, he has also power to vary it. Can it be said that if the husband's means become diminished there is no power to order a reduction in the wife's allowance? If so, why not, in a corresponding case, an increase? Therefore, I consider myself bound by the judgment of Lord Penzance to hold that I have power to make an order after decree, and also to vary an order after it has been made. Then comes the question whether having that

(1) 3 Sw. & Tr. 523. (2) 1 Sw. & Tr. 591. (3) 3 Sw & Tr. 208.

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power I ought to exercise it in this case? The parties agreed on alimony to a certain amount, and if the matter had stopped there I should have been very unwilling to interfere. I do not think that where a guilty wife has made to her what is really a compassionate allowance she has any absolute right to have it increased if the husband's income increases. But the clause in the agreement appears to me to shew that the parties, not intending to give the Court jurisdiction, but assuming the jurisdiction to exist, agreed that if the husband's income increased it might be reasonable and proper that the wife's allowance should be increased. Therefore, holding myself bound by *Prichard* v. *Prichard* (1), and taking the view I do of the agreement, it appears to me that this is a case in which it is right to consider what reasonable allowance should be made to the wife having regard to the husband's present income. The matter, therefore, must be referred back to the registrar to say what the amount should be.

Solicitors for petitioner: *G. J. Vanderpump & Son.*

Solicitors for respondent: *Darley & Cumberland.*

W. L.

July 14

IN THE GOODS OF S. SWEET.

Probate—Will—Insufficient Attestation Clause—Refusal of Attesting Witnesses to make Affidavit—Order requiring Attendance for Examination—Rules 4 *and* 7, *Non-Contentious Rules of* 1862—20 *&* 21 *Vict. c.* 77, *s.* 24.

The attestation clause to a will presented for probate being insufficient, the Registrar required an affidavit from the witnesses, under rule 4 of the Orders in respect of Non-contentious Business, that the will had been duly executed. Each of the three attesting witnesses—one being a beneficiary and the other the wife of a beneficiary—refused to make an affidavit. The executor made an affidavit, under rule 7, stating that the signatures of the testator and attesting witnesses were in their handwriting, and that no other persons were present at the execution:—

Held, that the evidence was not sufficient for a grant of probate under rule 7, but that an order might be made under s. 24 of the 20 & 21 Vict. c. 77, requiring the attesting witnesses to attend for examination as to the execution of the will.

APPLICATION for probate.

Stephen Sweet died April 11, 1891, leaving a will bearing date

(1) 3 Sw. & Tr. 523.

September 26, 1881, of which he appointed George Sweet, the applicant, sole executor. The attestation clause was in the following form:—

"Signed by the testator in the presence of us,

"Elizabeth Ellis.
"Alice Sweet.
"George Hulbert."

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When the will was brought into the Registry for probate, the registrar, in accordance with rule 4 of the Non-contentious Rules of 1862, required an affidavit from one of the attesting witnesses as to the due execution; but each of the three witnesses refused to make an affidavit. Elizabeth Ellis was a daughter of the deceased, and a beneficiary under the will; and Alice Sweet was the wife of a beneficiary. George Hulbert drew the will, and it remained in his possession; but his reason for refusing to make an affidavit was not stated. The applicant, who was the eldest son of the deceased, and the executor nominated by the will, made an affidavit under rule 7 that the signature of the testator was in his handwriting, and that the signatures of the attesting witnesses were also in their handwriting; and he also stated that no one was present at the time of the execution of the will except the testator and the three witnesses.

Barnard, moved for probate of the will, or, in the alternative, that the attesting witnesses be ordered to attend in Court to give evidence as to the execution. The applicant has, so far as it is in his power, complied with rule 7. His affidavit shews that the signatures of the testator and the attesting witnesses are in their handwriting. [He cited *Harris* v. *Knight*. (1)]

[JEUNE, J. Have you any authority for dispensing altogether with evidence from the attesting witnesses when their whereabouts is known and they can be communicated with?]

There is no authority exactly in point, because it is unusual for all the attesting witnesses to refuse to make an affidavit.

[JEUNE, J. The Court, under the 24th section of the 20 & 21 Vict. c. 77, "may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to

(1) 15 P. D. 170.

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be examined in any suit or other proceeding in respect of matters or causes testamentary."]

The operation of the section is limited by the words "in any suit or other proceeding." Here there is no suit, and it might be argued that "other proceeding" refers to a proceeding in the nature of a suit, or in the course of a suit. Sect. 26, which gives the Court power to compel the production of documents, has the express provision, "whether any suit or other proceeding shall or shall not be pending." But if the Court is of opinion that it can compel the attendance of the attesting witnesses, that will, no doubt, effect the object in view.

JEUNE, J. I am informed that on previous occasions persons have been ordered to attend in Court to tell what they know about the execution of a will. I should have been glad to avail myself of rule 7, and to dispense with the attendance of attesting witnesses if I thought that rule 7 intended that I should do so. But I have great doubt whether it is intended to govern a case where the witnesses are known, and where their evidence can be obtained. The best course is to obtain this evidence directly from the witnesses. I think that s. 24 of the 20 & 21 Vict. c. 77, gives the Court power to bring these witnesses before it to state what they know. There will be an order, therefore, directing the attesting witnesses to attend in Court to be examined as to the execution of the will.

[On a subsequent day George Hulbert attended and gave evidence of the due execution of the will, and the Court admitted it to probate.]

Solicitors: *Meredith, Roberts, & Mills.*

W. L.

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July 28, 29; *Aug.* 11.

Admiralty—Collision—Jettison of Cargo—Claim for General Average.

In a collision between a Dutch and an English steamer, the former was sunk, and the latter so injured that she had to jettison cargo to keep the part of the ship damaged out of the water whilst making for a port of refuge.

In an action in rem for damage by collision brought by the owners of the Dutch steamer against the English steamer, to which the owners of the latter appeared and counter-claimed, the Dutch steamer was found alone to blame.

On the reference as to damages the owners of the English steamer claimed (inter alia) to recover against the owners of the Dutch steamer the balance due in general average contribution from ship to cargo in respect of the jettison, after deducting the amount due from cargo to ship in respect of the damage to the ship:—

Held, that the claim must be disallowed, as the loss sustained by the ship in having to make the general average contribution was not directly due to the collision, but arose from the obligation to contribute, resulting from the relation between ship and cargo.

PETITION by defendants in objection to the assistant registrar's report, in an action of damage by collision, disallowing a sum of 314*l.* 17*s.* 9*d.* counter-claimed against the plaintiffs, as the contribution paid by the defendant shipowners to their cargo-owners in general average.

The material facts were as follows:—

On June 25, 1890, a collision occurred in the Bay of Biscay, between the Dutch mail steamer *Prins Frederik* and the English steamer *Marpessa*, by which the former was sunk, and the latter vessel sustained such injury that in order to bring her damaged bows out of the water whilst bearing up for Falmouth for repairs, she was obliged to jettison (of the grain cargo she was carrying from Taganrog to Dunkirk) 188,631 kilogrammes of barley.

An action was brought by the Stoomvaart Maatschappy Nederland, the company owning the *Prins Frederik*, against the owners of the *Marpessa* and freight, to recover the damages occasioned by the collision, and the owners of the *Marpessa* and freight counter-claimed to recover the damages they had sustained.

On July 22, 1890, Butt, J., found (and the Court of Appeal affirmed the finding), that the collision was occasioned solely by the fault of those in charge of the *Prins Frederik*. The learned

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judge therefore pronounced for the damage in respect of which the counter-claim was brought, condemned the plaintiffs and their bail therein, and referred the said damage to the registrar and merchants to report the amount thereof.

The defendants, the owners of the *Marpessa*, accordingly filed a claim for damages amounting to 6207*l.* 17*s.* 4*d.* This sum included an item of 884*l.* 18*s.* 11*d.*, the value of the cargo jettisoned. As, however, the owners of the cargo in question were not parties to the action or reference, and as it appeared that, by the bills of lading, under which the defendants were carrying the cargo, they were exempt from liability to the cargo-owners, the defendants obtained leave to amend the claim by striking out the above-mentioned item and substituting for it the sum of 722*l.* 19*s.* 4*d.*, being the proportionate contribution of ship and freight to general average losses in respect of the cargo so jettisoned.

On June 19, 1891, the assistant registrar made his report, assessing the amount due to the defendants at 3910*l.* 4*s.* 10*d.* with interest, but disallowing the whole of the item of 722*l.* 19*s.* 4*d.*

The defendants thereupon gave notice of objection to the report, and claimed to be entitled to recover from the plaintiffs the last-mentioned sum, or, in the alternative, the balance due from ship and freight to cargo after deducting from the 722*l.* 19*s.* 4*d.* the sum of 408*l.* 1*s.* 7*d.*, being the amount due from cargo to ship in respect of damage to the ship. Finally, the defendants only insisted upon the alternative claim for this balance, amounting to 314*l.* 17*s.* 9*d.*

1891. July 28, 29. *Barnes, Q.C.*, and *L. E. Pyke*, for the defendants, the owners of the *Marpessa*. The question arises out of the fact that the *Prins Frederik*, which has been adjudged alone to blame, is a foreign ship, and was sunk in the collision, and that in those countries which follow the civil law, where the wrong-doing ship is lost, her owners being only responsible to the extent of the ship, escape further liability. The result is that the owners of the cargo jettisoned from the *Marpessa* have no remedy abroad against the wrongdoer, but as the owners of

the *Prins Frederik* instituted proceedings in rem in England against the owners of the *Marpessa*, the owners of the latter availed themselves of the provisions of s. 34 of the Admiralty Court Act, 1861 (24 Vict. c. 10), in respect of cross causes for which counterclaims may now be substituted, and as there was a voluntary sacrifice of a portion of the cargo on board the *Marpessa*, for which the owners of the latter vessel are liable, under the provisional adjustment, to contribute the sum of 722*l.* 19*s.* 4*d.*, as the ship's proportion of the loss, her owners claim against the owners of the *Prins Frederik* this sum, or, on balance of account between ship and cargo, the sum of 314*l.* 17*s.* 9*d.*, as part of their damages, not as a claim on behalf of the cargo owners, who are not parties to the action, but as a claim for the contribution to general average which the owners of the *Marpessa* have to pay in respect of the cargo necessarily jettisoned to save the ship and the rest of the cargo, as in *Burton* v. *English.* (1)

This liability to a third party, viz., the cargo-owners, imposed upon the owners of the *Marpessa*, as the carrying ship, must be paid by the owners of the *Prins Frederik* as the wrongdoers, otherwise the principle of restitutio in integrum, upon which this Court acts, will not have been carried out. In this case the carrying ship has had to make a sacrifice, and to the extent she has suffered she is entitled to recover from the wrongdoer. It is not material whether the foundation of the right to general average is to be sought in the Rhodian law, or rests on implied contract or agency, a subject discussed at length in Lowndes' Law of General Average (4th edit. p. 24, et seq.), for the claim made in respect of it here is as damages directly and naturally flowing from the wrongful act, and recoverable as a natural and reasonable consequence of the collision, *The City of Lincoln* (2), and should be allowed just as interest is allowed when the wrongdoer claims to limit his liability in respect of damage by collision, *The Northumbria* (3), and loss of freight is allowed to the injured ship when carrying cargo, *The Yorkshireman* (4), where it was applied to the case of a cargo which the injured vessel was going to fetch.

(1) 12 Q. B. D. 218.
(2) 15 P. D. 15.
(3) Law Rep. 3 A. & E. 6.
(4) 2 Hagg. Ad. 30, n.

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Instances of the application of the principle of restitutio in integrum to the case of the loss of the benefit of future earnings are supplied by *The Argentino* (1), or of loss of a charterparty by *The Star of India* (2); *The Consett.* (3) In a similar way in *Crouch* v. *London and North Western Ry. Co.* (4), where the plaintiff, though not the owner of the goods lost by the carrier, was held entitled to recover the whole value without it being necessary that he should have actually paid the owner. So a salvage reward was held recoverable, which would have been earned if the smack had not been run down whilst engaged in the salvage service: *The Betsey Caines.* (5) So costs may be recovered against the wrongdoing ship which have been incurred in unsuccessfully defending a salvage action: *Tindall* v. *Bell.* (6)

The point that the shipowner may get more than an indemnity for his loss, is not material, because the owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and it has been held that if the necessary consequence of this is, that the value of the ship is increased, the owner is entitled to the benefit: *The Pactolus.* (7) If the necessity to contribute to general average does not arise from contractual obligation, but from the law of the sea, the case is all the stronger that the loss is a direct and natural consequence of the act of the wrongdoer, and the measure of damages is the amount the defendants have had to contribute in balance of account.

Myburgh, Q.C., and *J. P. Aspinall*, for the plaintiffs, the owners of the *Prins Frederik.* There is no trace in the records of this court of any such claim as that now set up having been pronounced for, though wrongdoers do not receive very tender treatment, and though, in the majority of collision cases, claims of general average arise. In the first instance, the claim put forward was for the total loss of the goods, but when the bill of lading was produced and it was seen that the owners of the *Marpessa* were under no obligation to make it good, and that the shipowners held no authority from the cargo owners in the

(1) 13 P. D. 191.
(2) 1 P. D. 466.
(3) 5 P. D. 229.
(4) 2 C. & K. 789.
(5) 2 Hagg. Ad. 28.
(6) 11 M. & W. 228.
(7) Swab. 173.

matter, then the suggestion was made to claim the amount under the head of general average. If the claim for general average is a loss arising from collision, the shipowners are exempt by the terms of the bill of lading, the payment therefore would be voluntary and, consequently, without resort over. If the claim does not arise out of the contract of affreightment but from the law of the sea, it does not arise directly from the collision, and the wrongdoer is not liable. The plaintiffs do not say that a claim for general average will not be entered upon by the courts, as such claims are dealt with, where properly arising, as shewn in *Crooks* v. *Allan* (1) and *Schmidt* v. *Royal Mail Steamship Co.* (2), and claims for general average incidentally arising as part of the litigation are dealt with in the Admiralty Registry, but the present claim does not arise directly from the collision. On inspection of the document filed in support of this claim, it would not seem to be an average adjustment in the sense of a final adjustment of general average, but a compromise or provisional arrangement between ship and cargo-owners, which either side may take steps to set aside, and if the figures were gone into it would turn out that the same items have been included under other heads, and have been already allowed for in the reference, so that the owners of the *Marpessa* have got complete restitutio in integrum, that is, they have recovered all the losses they have sustained from the collision. It cannot be assumed that the cargo-owner has no remedy, and the case between the two shipowners must be dealt with according to the ordinary practice of the courts of this country, leaving the cargo-owner to take any proceedings that may be open to him, whether in personam or otherwise. If this claim were allowed, and the cargo-owner in the carrying ship sued the wrongdoer, the latter would be called upon to pay more than amounted to restitutio in integrum, and a profit would be made out of the casualty. All the cases cited by the other side are cases of loss of property or of benefit resulting from the wrongful act, and they arose directly from the collision, which is not the case here.

L. E. Pyke, in reply.

Cur. adv. vult.

(1) 5 Q. B. D. 38. (2) 45 L. J. (Q.B.) 646.

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August 11. JEUNE, J. [After stating the nature of the action and of the reference, proceeded:—] The question is whether, in estimating the damages due to the *Marpessa*, the sum of 314*l.* 17*s.* 9*d.* is to be included. The argument for the claim is very simple. It is said that the general average loss was caused by the collision, and therefore the wrongdoing ship is liable to make good the sum which the *Marpessa* had to pay by way of general average contribution.

It is admitted that there is no precedent of any such claim ever having been allowed. It is hardly suggested that such a claim has ever been made. It is said that it is made in the present instance, because, the wrongdoing ship having been sunk, the cargo-owners can bring no action against the owners in their country, as the law of the country does not permit it, and it is said that they are not likely to be able to sue the owners in this country. It is not probably, however, the first time that such a set of circumstances has arisen, and even if it were, the principle contended for is one of general application, nor, it is to be observed, was the present claim that first put forward in this proceeding. Originally, the claim was for the total value of the cargo jettisoned, then an amendment was asked for to allow the 722*l.* 19*s.* 4*d.* to be claimed, as being the total sum due from ship to cargo. Before me the claim was limited to the sum of 314*l.* 17*s.* 9*d.*, being the amount due from ship to cargo on the balance of account between them.

The answer to the claim put forward appears to me to be not, as was suggested, that loss by collision is an exception in the bill of lading, because the bill of lading is not concerned with liabilities to contribution in general average: *Schmidt* v. *Royal Mail Steamship Co.* (1), nor, as was also suggested, that the Court would be compelled in this, and in all similar cases, to determine the amount of the general average contribution, because the Court is compelled to do this if the matter incidentally arise in a cause properly before it: *The Daring* (2); but that the loss sustained by the ship, by having to make the general average contribution in question, was not caused by the collision, though, of course, it would not have occurred had not the collision

(1) 45 L. J. (Q.B.) 646. (2) Law Rep. 2 A. & E. 260.

happened. Whether the rule that loss by general average must be borne proportionally by those interested, arises from an implied contract to contribute inter se, as was suggested by Lord Justice Bramwell in *Wright* v. *Marwood* (1), or whether, as the Master of the Rolls held in *Burton* v. *English* (2), "it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated in the law of England as the law of the ocean," or whether, as Lord Justice Bowen said (3) in the latter case, "in the investigation of legal principles the question whether they arise by way of implied contract or not often ends by being a mere question of words," it seems to me clear that it is the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution. It is an instance of the old distinction between causa causans and causa sine quâ non.

One consideration in particular appears to me to support this view. In this case the balance of contribution, as between owners of ship and owners of cargo, was against the owners of the ship; but the balance might have been the other way, and there must almost always be a balance of contribution in favour either of ship or of cargo where the general average loss extends to both. I put, therefore, to the counsel for the *Marpessa* what appeared to me to be a crucial question—if the balance on general average contribution had been due to the ship from the cargo, would it be reckoned in diminution of the damages? Mr. Barnes, I think, preferred to say that it would. If so, it appears to me that a principle similar to that on which it has been held that the benefit of an insurance cannot be claimed by a wrongdoer, *Bradburn* v. *Great Western Railway Co.* (4), *Jebsen* v. *East and West India Dock Co.* (5), is fatal to his contention. Mr. Pyke, on the other hand, said, unhesitatingly, that such balance could not be brought in to lessen the damages, that the ship could recover the full actual loss to it, that the cargo could recover the full

(1) 7 Q. B. D. 62, at p. 67.
(2) 12 Q. B. D. 218, at p. 200.
(3) 12 Q. B. D. 218, at p. 223.
(4) Law Rep. 10 Ex. 1.
(5) Law Rep. 10 C. P. 300, at p. 305.

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Jeune, J.

actual loss to it, and that, besides, one or other could recover the amount of the payment, which, on the balance of account, one or other must, in almost every case, have to make, and he did not shrink from the conclusion that the wrongdoer must thus in almost every case of the kind pay more than the total amount of the actual damage caused. I cannot think that that is the law; indeed, if it be, it is unaccountable that shipowners and cargo-owners have, since the institution of the Admiralty Court, neglected so obvious a method of profiting by collision.

I must, therefore, decide against the present claim.

Solicitors for petitioners (defendants), the owners of the *Marpessa: Gellatly & Warton.*

Solicitors for plaintiffs, the owners of the *Prins Frederik: Clarkson, Greenwells & Co.*

T. L. M.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1892, will be as follows:—

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ECCLESIASTICAL LAW—*Bishop—Illegal Practices in the Celebration of Divine Service—Rubrics—Communion Service—Lighted Candles—Mixing and administering Water and Wine—Eastward Position—Performing manual Acts before the People—Singing of Hymn Agnus Dei—Making Sign of the Cross—Ablution.*] A bishop of the Church of England was charged with having committed offences against the law ecclesiastical while officiating as principal celebrant at the service of Holy Communion. As to the first charge that the respondent permitted lighted candles to be used on the communion table when not required for the purpose of giving light:—*Held*, that the mere fact that two lighted candles, not required for the purpose of giving light, were kept standing on the table continuously through the service did not constitute a breach of the law. As to the charge of allowing water to be mixed with the sacramental wine, and administering the wine and water so mixed to the communicants:—

ECCLESIASTICAL LAW—*continued.*

Held, that mixing water and wine in and as part of the service was unlawful, but that the use of a cup containing water and wine mixed beforehand was not an ecclesiastical offence. As to the charge of standing during the Communion Service down to the ordering of the bread and wine on the west side of the table and not on the north side thereof:—*Held*, that the act above described was not illegal. As to the charge of performing the manual acts whilst standing in such a position that they could not be seen by the communicants:—*Held*, that the manual acts must be performed so as to be visible to the communicants. As to the charge of permitting the hymn Agnus Dei to be said or sung immediately after the prayer of consecration:—*Held*, that this was not an illegal addition to the service. As to the charge of making the sign of the cross during the absolution and the benediction:—*Held*, that this action was a ceremony additional to the ceremonies of the Church, and was unlawful. As to the charge of pouring the water and wine into the paten and chalice and drinking the said water and wine as part of the service:—*Held*, that the doing of the acts complained of by themselves was not a ceremony, and that having been done after the benediction, and not as part of the service, they were not unlawful. READ *v.* BISHOP OF LINCOLN - - - - - 9

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ADMINISTRATION——*Administration Bond—Grant to Committee of Lunatic Executor—Estate found to be Larger than Original Estimate—Sureties allowed to give a Bond to Double the amount actually in the hands of the Administratrix.*] An executor, who was also sole legatee, having been found to be a lunatic by inquisition, his committee took out letters of administration for his use and benefit, and entered into a bond jointly with a guarantee society for double the sum of 4569*l.*, at which the value of the estate was then estimated.

ADMINISTRATION—*continued.*

It was afterwards found that the estate was entitled to a further sum of 4492*l.*, and a second bond was required. The administratrix had paid into Court to the account of the lunatic 6823*l.*, retaining in her hands, after paying debts and testamentary expenses, 650*l.*:—*Held*, that the sureties might be allowed to enter into a bond in double the amount remaining in the hands of the administratrix. IN THE GOODS OF CORMACK [1891

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ADMINISTRATION—*continued.*

2. —— *Administration pendente lite—General Grant reduced to a Limited Grant.*] An administrator pendente lite, who was also the executor of the will in dispute, had taken out a general grant of administration, but found a difficulty in obtaining sureties to the administration bond to the full amount of the testator's estate:—*Held*, that the grant might be limited to the amount to be received in respect of two mortgages which were about to be paid off, together with the amount of one half-year's dividends on certain shares, such mortgage debts and shares forming part of the estate of the deceased. ASKEW *v.* ASKEW - 174

3. —— *Joint Grant—Widow and two elder Sons—Consent of Minor.*]—A man who died intestate left a testamentary paper which he had signed, but which was not duly executed, in which he expressed a wish that his property should be divided equally between his wife and his five children, and that his business should be carried on by his wife and his two elder sons, whom he appointed his executors. All the children were of full age except the youngest, who was twenty years and six months old, and all the persons interested were desirous that a joint grant of administration should be made to the widow and the two elder sons:—*Held*, that there were special circumstances to justify the Court in making a joint grant as prayed. IN THE GOODS OF DICKINSON - 292

4. —— *Foreign Will disposing of Property Abroad—Intestacy as to English Estate—Grant.*] The deceased left a will expressly limited to her property abroad, which was proved by the executors in the foreign Court; but she died intestate as to her property in this country:—*Held*, that administration of the property in this country might be granted to her sole next of kin. IN THE GOODS OF MARY E. MANN - - 293

5. —— *Grant to a Son, passing over the Husband.*] Where the husband of an intestate had been cited to take out letters of administration to the personal estate and effects of his wife and had entered no appearance to the citation, the Court passed him over and made a grant of administration to the only son of the intestate. IN THE GOODS OF SARAH MOORE - - - 299

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PRACTICE—*Production of Documents.*] The defendants in an action by the plaintiff propounding a will having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, bankers' cash books, and other entries and memoranda relating to the testatrix and her affairs:—*Held*, that the papers above mentioned being the private property of the solicitor, the plaintiff could not be compelled to produce them for inspection;—*Held*, further that an order could not be made directing the administrator pendente lite to inspect the papers and take copies of them for the defendants. O'SHEA *v.* WOOD - - - - 237

2. —— *Will—Executor absent from the Country—Power of Attorney—Grant of Probate to Attorneys.*] An executor who was absent from the country, and who was expected to be absent for two years, had before his departure executed a power of attorney, in general terms, enabling the persons named in it to act for him about all his concerns or business of every kind whatsoever as fully and effectually as he himself could do, and also to appear for him in any Court of justice in any action or proceeding to which he might be a party:—*Held*, that the power was sufficiently wide to justify the Court in making a grant with the will annexed to the parties named in it for the use and benefit of the executor. IN THE GOODS OF BARKER - - - - 251

3. —— *Two Wills—Property in England and Canada—Independent Grant for English Will—Affidavit as to Moveables.*] A testator possessed of property in England and Canada made two wills, each purporting to be independent of the other, and disposing only of the estate situate in the country to which it referred:—*Held*, that probate might be granted of the English will on an affidavit being filed exibiting a copy of the Canadian will, and a statement that such affidavit had been filed being indorsed on the probate; but that an affidavit must be made that the moveable chattels bequeathed by each

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4. —— *Two Wills—Separate Disposition of Property in England and Scotland—Debts charged on one Estate only—Grant.*] A testator executed two testamentary papers, one disposing exclusively of property in Scotland, the other dealing solely with property in England. By the Scotch testamentary paper all the testator's debts were charged on the Scotch estate. Two of the executors of the English will were trustees of the Scotch estate. The Court being satisfied that no creditor would be prejudiced, made a grant of probate of the English will alone, without requiring the Scotch deed to be incorporated, upon condition that a certified copy of such deed was filed, and a note to that effect made on the probate. IN THE GOODS OF FRASER 285

5. —— *Production of Documents—Documents belonging to Solicitor—Order XXXVII., rr. 5, 7—Privileged Communications.*] The defendants in an action by the plaintiff propounding a will, having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, banker's cash-books containing entries and memoranda relating to the deceased and her affairs, which documents were the private property of the solicitor:—*Held*, affirming the decision of Jeune, J., that an order could not be made on the plaintiff to produce them for inspection: *Held*, also, affirming the decision of Jeune, J., that the solicitor could not be compelled under Order XXXVII., r. 7, to produce these documents for the purpose of discovery, nor be called for examination at this stage of the proceedings under Order XXXVII., r. 5: *Held* (reversing the order of Jeune, J.), that an affidavit by which a party objected to produce documents because she claimed them "to be privileged, as communications between herself and her solicitor," was insufficient to protect them, it being necessary to shew that the letters were professional communications of a confidential character. O'SHEA *v.* WOOD C. A. 286

6. —— *Defendant a Minor residing out of Jurisdiction—Refusal to enter an Appearance—Official Solicitor nominated Guardian ad litem—Contentious Rules of Probate Court*, 1862, *r.* 74—*Rules of Supreme Court*, 1883, *Order XIII., r.* 1—*Practice.*] The defendant in a probate action was a minor resident out of the jurisdiction. Notice of the writ had been served upon her, and upon her guardian nominated by the foreign Court, but no appearance had been entered on her behalf, and it appeared that her guardian declined to enter an appearance. The Court, holding that the practice was governed by Order XIII., r. 1, and not by rule 74 of the Contentious Rules of the Probate Court, 1862, nominated the official solicitor of the Court to be the defendant's guardian ad litem, and ordered that his costs should be part of the costs of the plaintiff who was the executor propounding the will. WHITE *v.* DUVERNAY - - - - - - 290

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7. —— *Will — Inspection of Testamentary Papers—20 & 21 Vict. c.* 77, *s.* 26; 21 & 22 *Vict. c.* 95, *s.* 23.] Where the executors and the solicitor of a deceased testatrix had refused to give any information as to previous wills alleged to have been executed by the testatrix to persons who believed themselves to have been benefited by them, the Court, under the 26th section of the Court of Probate Act, ordered them to bring into the registry all wills and testamentary papers of the deceased in their possession, and to allow the applicants to take copies of them. IN THE GOODS OF SHEPHERD - - - - - - 323

8. —— *Will—Insufficient Attestation Clause—Refusal of Attesting Witnesses to make Affidavit—Order requiring Attendance for Examination—Rules* 4 *and* 7, *Non-Contentious Rules of* 1862—20 & 21 *Vict. c.* 77, *s.* 24.] The attestation clause to a will presented for probate being insufficient, the Registrar required an affidavit from the witnesses, under rule 4 of the Orders in respect of Non-contentious Business, that the will had been duly executed. Each of the three attesting witnesses — one being a beneficiary and the other the wife of a beneficiary—refused to make an affidavit. The executor made an affidavit, under rule 7, stating that the signatures of the testator and attesting witnesses were in their handwriting, and that no other persons were present at the execution: — *Held*, that the evidence was not sufficient for a grant of probate under rule 7, but that an order might be made under s. 24 of the 20 & 21 Vict. c. 77, requiring the attesting witnesses to attend for examination as to the execution of the will. IN THE GOODS OF S. SWEET - - - - - - 400

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WILL—*Attestation—Signatures of Witnesses in the Margin of Will—Subscription*—1 *Vict. c.* 26, *s.* 9.] The attesting witnesses to a will signed their names in the margin of the first and second sheets opposite to certain amendments:—*Held*, following *Roberts* v. *Phillips* (4 E. & B. 450), on proof that the witnesses signed with the intention of attesting the testator's signature, that this was a valid subscription within the requirements of s. 9 of the Wills Act, and that the will might be admitted to probate. IN THE GOODS OF STREATLEY [172

2. —— *Mistake—Name of Legatee wrongly described—Grant of Probate with Name omitted.*] A testator in giving instructions for the preparation of his will directed that a bequest of 10,000*l.* should be given to each of his unmarried daughters "Georgiana" and "Florence." The conveyancer who prepared the will, by inadvertence inserted the name of Georgiana in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the name of Florence altogether. The draft was not read over to the testator at any time, and the error was not brought to his notice:—*Held*, that probate of the will omitting the name of Georgiana in the second clause of gift might be granted to the executors. IN THE GOODS OF SIR J. E. BOEHM 247

3. —— *Residuary Bequest—"All other effects"—Grant.*] A testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease." The will went on to make specific bequests to his wife of money, shares, securities, &c.; and it directed her to pay his debts, and it left it to her discretion whether she would provide for his son and daughters by a previous marriage and a nephew. It contained no bequests to any other person:—*Held*, that the words "all other effects" constituted his wife residuary legatee. IN THE GOODS OF JUPP - - - 300

4. —— *Codicils—Revocation—Revival by Reference.*] A testator executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874 and the will of 1875 died; and he made another codicil in 1881 disposing of the property which he had left to them—which he described as a codicil to his last will and testament—and which began in these words: "Whereas, my two sisters named in my codicil, dated May 12, 1874, are both since dead," &c.:—*Held*, that the reference to the codicil did not revive it, and it was, therefore, excluded from probate. IN THE GOODS OF DENNIS - 326

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CHILDREN, CUSTODY OF—*Access to Children —Wife found guilty of Adultery—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4.] Where a decree for dissolution of marriage has been made on the ground of the adultery of the wife, and the infant children of the marriage have been given into the custody of the husband, the Court is not precluded from making an order giving the divorced wife access to them, but as a general rule such an order will not be made. HANDLEY *v.* HANDLEY - C. A. 124

2. —— *Wife's Petition — Permanent Maintenance—Application to rescind or vary Order—Unfitness of Mother—Custody given to the Father.*] A decree for dissolution of marriage having been made on the wife's petition on the ground of the husband's adultery and cruelty, the custody of the children of the marriage was given to the petitioner, and the respondent was ordered to pay the petitioner for her maintenance the sum of 75*l.* a year. The petitioner took charge of one child, a girl of eleven years of age, but allowed the respondent to retain the other, a boy of fifteen. Subsequently the respondent applied to rescind or vary the order, and on an inquiry before the registrar it was shewn that the petitioner was no longer a fit person to have charge of her daughter. The Court made an

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2. —— *Petition by Husband — Wife found guilty of Cruelty—Agreement to pay Wife a weekly Allowance—Increase in Income of Husband—Application for increased Allowance*—20 & 21 *Vict.* c. 85, ss. 17-32.] A husband having obtained a decree of judicial separation on the ground of his wife's cruelty, agreed to make her a weekly allowance of 2*l.*, and the agreement contained a clause providing that it should not operate as an estoppel, or to prejudice the right of either husband or wife to make an application to the Court for an increase in the amount of her allowance. After the decree the income of the husband increased considerably, and the wife presented a petition for the allotment of permanent alimony:—*Held*, that the Court has jurisdiction to make an order granting permanent alimony to a wife against whom a decree of judicial separation has been made for misconduct, and that it has also power from time to time to vary such order. GOODDEN *v.* GOODDEN - - - 395

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2. —— *Variation of Settlements — Parties Domiciled in Scotland at time of the Marriage—Settlements in Scotch form*—22 & 23 *Vict.* c. 61, s. 5.] Court has power to entertain a petition for variation of settlements, although the petitioner and respondent were domiciled in Scotland at the time of the marriage, and although the settlements were made in the Scotch form *Nunneley* v. *Nunneley* (15 P. D. 186) explained and followed. FORSYTH *v.* FORSYTH - 363

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NULLITY OF MARRIAGE—*Coercion—Incapacity to Resist—Intimidation—Fraud—Free Will—Consent.*] In a suit by a woman for declaration of nullity of marriage, it appeared that the petitioner and respondent were Americans and cousins—the petitioner at the time of the ceremony hereafter referred to being twenty-four, and the respondent under twenty-one years of age. The respondent had made an offer of marriage to the petitioner, which she had refused, and on a Sunday in July, 1888, under the pretence of going to the afternoon service at St. Paul's Cathedral, he took her to St. Bride's Church, Fleet Street, and outside the church said to her suddenly, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." According to her own statement she was so alarmed that she did not know what she was doing, and went into the church, where the ceremony of marriage was performed, and she signed the register. The respondent had previously obtained a licence, on a false declaration as to his own age and as to the petitioner's residence, and had made arrangements at the church for the marriage to be performed that day. The Vicar of St. Bride's, who performed the ceremony, stated that the petitioner went through it without showing any signs of unwillingness, repeated the responses in an audible tone, and signed the register in a clear, firm hand. After the ceremony the respondent took the petitioner home, and left her at the door of the house. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins and not as husband and wife. The petitioner never told her parents or friends of the marriage, because, as she said, she did not regard it as binding. The respondent, who did not appear in the suit, admitted that he had only married the petitioner for her money, and that he did not care for her. There was evidence that the petitioner was of a weak, impressionable character, with not much power of resistance to a stronger will, but that she was not particularly disposed to fall into a hysterical state in the medical sense of the term:—*Held*, that the facts were insufficient to rebut the presumption of consent; that the marriage was valid, and that the suit must be dismissed. COOPER (falsely called CRANE) *v.* CRANE - - - 369

PRACTICE—*Affidavit of Documents—Discovery tending to shew Adultery—Discovery by Infant.*] In a petition by a husband for dissolution of marriage, the petitioner applied for an order that the respondent, who was a minor, should make the usual affidavit as to documents. The only issue in the suit was that of adultery:—*Held*, by Butt, J., on the authority of *Mayor* v. *Collins* (24 Q. B. D. 361), that, as the respondent was an infant, such an order could not be made against her:—*Held*, by the Court of Appeal, that, as *Mayor* v. *Collins* turned upon the rules of the Supreme Court, it was not applicable, since by Order LXVIII., rule 1 (*d*), those rules do not apply to proceedings for divorce. Whether an order for discovery cannot be made against an infant in proceedings for divorce, *quære*. But, *held*, that in the present case an order ought not to be made, for that discovery ought not to be required from a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery. REDFERN *v.* REDFERN C. A. 139

2 —— *Husband's Petition—Provision for Wife proved guilty of Adultery—Dum sola et casta clause.*] Provision made for maintenance of a wife proved guilty of adultery without the insertion of a dum sola et casta clause in the order. LANDER *v.* LANDER - - - - 161

3. —— *Wife's Petition—Husband's Cruelty and Adultery—Legal Cruelty—Undefended Suit—Question argued by Queen's Proctor—Delay in Presentation of Petition—Divorce and Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Divorce Court Amendment Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 5.] In August, 1890, a wife presented a petition for a divorce upon the ground of adultery coupled with cruelty. The marriage had taken place in December, 1858; the only child of the marriage—a son—was born in 1866, and the parties separated by agreement in 1870. A separation deed was then executed by them, which contained the usual covenant by the husband that he would not molest the wife; and they had lived apart ever since The wife never took any proceedings before the petition; the cruelty charged took place between 1861 and 1870, and the adultery charged was in 1889. No act of personal violence was alleged; and the cruelty charged against the husband was his conduct in living for many years with successive mistresses, and telling his wife of his infidelities and of his preference of other women to her. The suit was undefended; and the witnesses gave evidence that the wife's health was delicate, and that the husband's conduct had to his knowledge impaired it. The only explanation given by the petitioner of her delay in taking proceedings was in effect that she did not wish to proceed until her son had grown up and she could ascertain his wishes:—*Held*, by Butt, J., that the husband's conduct did not amount to legal cruelty, and that the wife was not entitled to a divorce. On appeal, *held*, by the Court (Lindley, Lopes, and Kay, L.JJ.), that, even assuming legal cruelty to have been proved against the husband, the wife's delay of twenty years in taking proceedings had not been sufficiently explained, and was so unreasonable that the Court, in exercise of its discretion under the

PRACTICE—*continued.*

Divorce and Matrimonial Causes Act, 1857, s. 31, ought to refuse to decree dissolution of the marriage. The judgment of Butt, J., affirmed. BEAUCLERK *v.* BEAUCLERK - - C. A. 189

4. —— *Permanent Maintenance to Wife—Clause dum sola et casta—29 & 30 Vict. c. 32, s. 1.*] There is no rule that in an order granting permanent maintenance to a divorced wife the dum sola et casta clause ought to be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The Court must in each case determine what is reasonable, having regard to (1.) the conduct of the parties; (2.) their position in life, and their ages and their respective means; (3.) the amount of the provision made; (4.) the existence or non-existence of children, and who is to have the custody of them; and (5.) any other circumstances which may be important in any particular case. The wife of an officer in the army obtained a decree for dissolution of marriage on the ground of adultery and cruelty. There was no child, and neither party had any property, the husband having only his pay. An order was made for permanent maintenance at the rate of 60*l.* a year, and Jeune, J., directed the insertion of the dum sola et casta clause, considering that there was a general rule for inserting it unless there was some reason for omitting it:—*Held*, by the Court of Appeal, that that there was no such general rule, and that in the present case, having regard to the innocence of the wife, the misconduct of the husband, the fact that the wife had no property, and the smallness of the allowance, the clause ought not to be inserted. WOOD *v.* WOOD - - C. A. 272

5. —— *Husband's Petition—Wife's Costs—Non-compliance with Order for Security for Costs—Attachment refused.*] In a petition by the husband for dissolution of a marriage, the petitioner had been ordered to pay or secure a certain sum for the respondent's costs of the hearing of the cause. The petitioner failed to comply with the order, alleging want of means on his part. The Court, under the circumstances, refused to enforce the order by the issue of a writ of attachment. CLARKE *v.* CLARKE - - - 278

6. —— *Queen's Proctor, Intervention by—Decree Nisi rescinded—Costs against Co-Respondent—23 & 24 Vict. c. 144, s. 7; 41 & 42 Vict. c. 19, s. 2.*] A husband having obtained a decree nisi in a petition for divorce, on the ground of his wife's adultery, the Queen's Proctor intervened, and charged that the decree had been procured by the collusion of the respondent and co-respondent. The co-respondent was cited, but did not appear. At the hearing, the Court having found the issues in favour of the Queen's Proctor, condemned the co-respondent in costs. TAPLEN *v.* TAPLEN - - - - - 283

7. —— *Husband's Petition—Costs of Wife—Money paid into Court as security for Wife's Costs—Set-off of Costs—Lien of Solicitor.*] The Court of Appeal has jurisdiction to order the husband's costs of an unsuccessful appeal by the wife in divorce proceedings to be paid out of money which he has paid into court to defray the wife's costs of the hearing; but the court will not make

PRACTICE—*continued.*

such order to the prejudice of the lien of the wife's solicitor unless he has so conducted himself as to justify so strong a measure. A husband obtained a decree nisi for dissolution of marriage, and the usual order was made for payment of the costs of the wife. The wife appealed, and the appeal was dismissed with costs as frivolous. The wife thereupon applied to have money which had been paid into court by the husband as security for her costs paid out to her solicitor, whose taxed costs under the decree nisi exceeded that amount, and the husband made a cross application that his costs of the appeal might be paid out of the money in court:—*Held*, that though the wife's appeal was a hopeless one, there was no ground for affirming that her solicitor acted vexatiously or oppressively in conducting it, and that he ought not to be deprived of his lien on the fund for the costs of the wife's defence. HALL *v.* HALL - C. A. 302

8. —— *Alimony pendente lite—Respondent's Means—Partnership Books, Refusal to produce—Attachment—Rule 191 Divorce Court Rules.*] In a petition by the wife for dissolution of the marriage, she applied for an allotment of alimony pending suit. The respondent in answer filed a balance-sheet, shewing a loss on his whole business for the year, and the registrar made an order on the respondent and his partner to produce their account books. They accordingly produced a ledger for the last year, but refused to allow it to be inspected. The Court on motion *held* that the registrar had power under rule 191 to require an inspection of the ledger, and issued a writ of attachment to enforce compliance with his order. CAREW *v.* CAREW - - - - 360

9. —— *Costs—Husband's Petition—Jury discharged without Verdict—Full Costs of Hearing allowed to the Wife—Practice.*] At the trial of a petition by a husband for divorce the jury disagreed, and were discharged without giving a verdict. The Court, upon the application of the wife, made an order that her costs of the hearing should be taxed and paid in full, and refused to limit such costs to the amount deposited in Court. HURLEY *v.* HURLEY AND MENZIES - - 367

—— Husband's Petition—Decree—Non-compliance by wife—Petition for settlement of wife's separate estate for benefit of husband—Order—Appeal—Dismissal of petition - - - - 305

See RESTITUTION OF CONJUGAL RIGHTS. 4.

RESTITUTION OF CONJUGAL RIGHTS.—*Application by Husband—Non-compliance with Decree—Order for Settlement out of Wife's Separate Property—Discretion of Court—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.] Where a decree for restitution of conjugal rights, made on the application of the husband, has not been complied with by the wife, the Court in exercising its discretion to order a settlement out of the wife's separate property for the benefit of the husband, under 47 & 48 Vict. c. 68, s. 3, may take into consideration the general conduct of the parties. In ascertaining the amount of the annual payment to be settled by the wife upon the husband, the

RESTITUTION OF CONJUGAL RIGHTS—*contd.*
Court declined to go into a minute debtor and creditor account of the sums spent by the husband or wife on household expenses and the like, but directed that a deduction should be made from the amount of the annual payment to the husband until a loan of 300*l.* which he had obtained from his wife was repaid; and also took into consideration the contingency of the husband being able to acquire an income by his own earnings. SWIFT *v.* SWIFT - - - - - 129

2. —— *Husband's Petition—Refusal of Wife to comply with the Decree—Application for settlement of Wife's Separate Estate for benefit of Husband—Property already settled to her separate use without Power of Anticipation—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.] A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, application was made under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), for a settlement of her property for the benefit of the husband and of the children of the marriage, when it appeared that the whole of the wife's property had been settled on the occasion of the marriage to her separate use without power of anticipation:—*Held*, that the restraint on anticipation did not prevent the Court from ordering a settlement to be made of the wife's property under s. 3 of the Act. MICHELL *v.* MICHELL - - - - - 166

3. —— *Refusal of Wife to comply with the Decree—Settlement of Wife's Separate Estate for Benefit of Husband—Restraint on Anticipation—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.] A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, application was made under s. 3 of the Matrimonial Causes Act, 1884, for a settlement of her property for the benefit of the husband, when it appeared that the whole of the wife's property had been settled on the occasion of her marriage to her separate use without power of anticipation:—*Held*, reversing the decision of Jeune, J., that the Court had no power to order a settlement of the property which was subject to the restraint on alienation. *Swift* v. *Swift* (15 P. D. 118; [1891] P. 129) explained. MICHELL *v.* MICHELL - - - - - 208

4. —— *Husband's Petition—Decree—Non-compliance by Wife—Petition for Settlement of Wife's Separate Estate for Benefit of Husband—Order—Appeal—Dismissal of Petition—Costs—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.] A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, he presented a petition under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), for a settlement of her property for the benefit of himself and the children of the marriage; when it appeared that the whole of the wife's property had been settled on the occasion of the marriage to her separate use without power of anticipation. It was objected that there was no jurisdiction under the Act to order a settlement of the wife's property. The Court overruled the objection, but on appeal the Court of Appeal decided that there was no power to order a settlement of the property, which was subject to restraint on anticipation:—*Held*, that the petition for a settlement must be dismissed; but that, under the circumstances, the petitioner ought not to be ordered to pay the respondent's costs of the petition. MICHELL *v.* MICHELL 305

SEPARATE ESTATE—Restitution of conjugal rights—Settlement for benefit of husband—Restraint on anticipation - 208
See RESTITUTION OF CONJUGAL RIGHTS. 3.

SEPARATION DEED—*Agreement to Separate—Marriage Contract under French Law—Deed drawn by Registrar—Variation of Conditions of Contract—Powers of Registrar*—47 & 48 *Vict. c.* 61, *s.* 14.] In a suit by the wife for dissolution of marriage the parties at the hearing agreed on certain terms of separation which were made an order of Court, and it was referred to the registrar to draft a deed of separation embodying these terms with the usual clauses and with full power to determine all questions as to the form of the deed and all questions arising out of the terms of the settlement. The agreement, in addition to the usual conditions as to molestation, custody of and access to children, stipulated that the husband should receive 250*l.* a year out of the annual income secured to the wife by the marriage contract, and that the husband should give up to the wife all articles of plate, jewelry, &c., belonging to her. The parties, being English subjects, had been married in Paris, and the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of the petitioner as her dowry should pay over to the husband and wife a sum of 200,000 francs, and that they should further pay an annuity of 30,000 francs for the benefit of the wife and her children, the same to lapse if the donors died before the recipient and the children of the marriage, and in the case of the death of the wife without children before her parents, they contracted to pay the husband an annuity of 12,500 francs. The contract also contained various conditions as to the investment and devolution of property acquired by the wife at and after her marriage, the power of disposing of property moveable and immoveable by the husband and wife mutually in each other's favour, the mutual liability for debts contracted by either, &c. The deed of separation prepared by the registrar proposed that the income of 30,000 francs secured by the marriage contract should hereafter be deemed to be the sole property of the wife, and that all real and personal property, moveable or immoveable, now belonging or hereafter accruing to the wife, should be her separate property, independent of the control of her husband, and that all such property not disposed of by her by will or gift should go to such persons as would have been entitled to it if the husband had died in her lifetime. It also required the respondent to relinquish all rights conferred on him by the marriage contract as to the investment of property acquired by the wife after marriage, and as to the rights of inheritance of the survivor to the property of the party who died first, and, finally, it stipulated that

SEPARATION DEED—*continued.*

either of the parties should be at liberty to apply to the proper French tribunal for the ratification of the deed or of any of its provisions. The respondent refused to execute the deed on the ground that it was ultra vires as varying the conditions of the marriage contract, and on a motion under s. 14 of 47 & 48 Vict. c. 61, to nominate some person to sign the deed:—*Held*, that, under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, and, also, whether an intention that separation of goods should not take place could be gathered from the agreement. But, *held*, further, that the parties on signing the agreement, could only be taken to have intended that the deed should embody and carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband and wife and to the giving up by the husband of all articles belonging to the wife—and that the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract:—*Held*, accordingly, that the deed must be referred back to the registrar to be reformed. DE RICCI *v.* DE RICCI - - - - - - - - 378

SETTLEMENT, ORDER FOR—Restitution of conjugal rights—Non-compliance with decree—Wife's separate property 129
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SETTLEMENTS, VARIATION OF - - 363
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—— Nullity of marriage—Colonial decree—Jurisdiction of High Court - 279
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SOLICITOR—Lien—Husband's petition—Costs of wife—Money paid into Court as security for wife's costs—Set-off of costs—Lien of solicitor - - - - 302
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24 & 25 Vict. c. 100, s. 43 - - 254
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29 & 30 Vict. c. 32, s. 1 - - - 272
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41 & 42 Vict. c. 19, s. 2 - - - 283
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ADMIRALTY.

BILL OF LADING—Exceptions—Perils of the sea occasioned by negligence of master
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—— Carriage of goods—Ship—Non-delivery—Sale at Port of distress—Law of the flag—Duty of master by German law
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CASES—*Peace, The* (Swa. 115) followed - 265
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—— *Walker* v. *Crystal Palace District Gas Co.* (1891-2, Q. B 300) dissented from 355
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CHARTERPARTY—Ambiguity—Extrinsic evidence - - - - 131
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CHARTERPARTY—*continued.*

—— Bill of lading—Exceptions - - 152
See SHIP. 2.

COLLISION—*Damages—Joint Tortfeasors.*] In an action to recover damages for collision brought against a tug and a vessel in tow, each of these vessels was found to blame. On motion to amend the judgment by the insertion of words to the effect that each of the wrongdoing vessels was severally liable for one-half only of the entire damages:—*Held*, that such amendment ought not to be made. THE AVON AND THOMAS JOLIFFE - - - - - - 7

2. —— *Vessel carrying Misleading Light—Mersey River Rules, Art. 4—Infringement by—Possibility contributing to Collision—Merchant*

COLLISION—*continued.*

Shipping Act, 1873 (36 & 37 *Vict.* c. 85), *s.* 17.] By art. 4 of the rules as to lights to be carried by vessels in the river Mersey—contained in the schedule to the Order in Council of May 17, 1890, and made in pursuance of s. 82 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63)—a vessel, having two or more masts, when at anchor in that river, shall carry two white lights, of the prescribed size and power, one on the forestay, at a height not exceeding twenty feet above the hull, and the other near the stern at double the height of the bow light. By s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), a vessel infringing any of the regulations contained in, or made under, the Merchant Shipping Acts, is, in case of collision, to be deemed in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary. The *T.*, a steamship under way in the Mersey, came into collision with another vessel whilst carrying—in addition to the ordinary coloured side lights, white stern light, and white masthead light — another white light on the mizen truck alleged to be a Customs' signal light. No regulation or practice to carry such last-mentioned light was proved, and, it being doubtful on the evidence whether the two white lights of the *T.* which were first seen, viz. that at the masthead and that at the mizen truck, might not have misled those in charge of the other vessel into thinking that these lights indicated that the *T.* was a vessel at anchor:—*Held*, that the *T.* must be deemed in fault under s. 17 of the Merchant Shipping Act, 1873. THE TALBOT. [184

3. —— *Delay in instituting Action in rem—Maritime Lien—Change of Interest—Statutes of Limitation—Practice—Interest on Damages.*] In 1878 a collison occurred, in the North Sea, between a Norwegian steamer and a British vessel, in which the latter was sunk. The name and place of business of the Norwegian company owning the steamer were known to the owners of the British vessel, and for one or more days, on forty-seven occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During the same period there were changes in the capital and in the shareholders of the Norwegian company. In 1889 the plaintiffs, the owners of the British vessel, instituted an action in rem against the Norwegian steamer. The owners of the Norwegian steamer, as defendants, pleaded, in bar of the action, that the claim of the plaintiffs, their rights (if any), and their maritime lien (if acquired), had been lost by laches, and that it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, and the greater part of the crew of the steamer were not now available to give evidence:—*Held*, that the plaintiffs were entitled to prosecute their claim for damages, for in each case the particular circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, and the change of property, and in this case, though the defendants would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, the defendants had failed to shew that the merits could not be gone into. The action was subsequently compromised on the terms that the defendants should pay to the plaintiffs one half of the damages proceeded for. In assessing such damages the registrar awarded interest on the amount at 4 per cent. from the time the British vessel would probably have reached her destination (May 1, 1878) until payment. On objection to the registrar's report, on the ground that no interest was due at all on an amount which had not been ascertained until the institution of the action, or that no interest was due under the circumstances of this case, as no claim had been made for eleven years, or that the interest should be limited to six years by analogy to the Statute of Limitations:—*Held*, that the interest was properly awarded for the whole period, according to the practice in Admiralty. THE KONG MAGNUS - - - - 223

4. —— *Duty of Steam Vessel turning round in River Thames—Thames Navigation Rules, arts.* 17 (*c*), 18.] By art. 17 of the Rules for the Navigation of the River Thames, "When two steam vessels are in sight of one another, and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take . . . . (*c*) three short blasts of a steam whistle, each of about three seconds duration, shall mean "I am reversing my engines." By art. 18, "When a steam vessel is turning round . . . . she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds duration. A steam vessel turning round in the River Thames, and at a time when, as part of the manœuvre, she was reversing her engines, gave, to a steam vessel in sight, and approaching with risk of collision, the three-blast signal prescribed by art. 17:—*Held*, that she was bound to make the four-blast signal, prescribed by art. 18, when beginning to execute the manœuvre of turning round, the object of the four blasts being to give notice, in due time, that a manœuvre of the kind is about to be carried out. THE NEW PELTON 258

5. —— *Trawler—Pyrotechnic Light—Sea Collision Rules, Art.* 10, *Sched. Part* II.—*Order in Council, June* 24, 1885.] By the Regulations for Preventing Collisions at Sea, Art. 10, Sched. Part II. (as modified by Order in Council of June 24, 1885), a British sailing trawler in the North Sea, having her trawl in the water, and carrying the prescribed white light, is to be supplied with red pyrotechnic lights, and shall shew "one of the red pyrotechnic lights . . . . on being approached by another . . . . vessel in sufficient time to prevent collision." A British sailing trawler, in the North Sea, with her trawl in the water, and carrying the prescribed white light, did not shew a red pyrotechnic light to an approaching vessel until there was risk of collision by that vessel suddenly shutting in her red, and shewing her green light, on the trawler's port bow at the distance of one-third of a mile:—*Held*, that the

COLLISION—*continued.*
trawler had complied with the regulations, for the rule does not mean that it is necessary to shew the pyrotechnic light under all circumstances when a trawler is being approached by another vessel, but that the duty is thrown upon the trawler of shewing the pyrotechnic light in time to prevent collision when a vessel is approaching under such circumstances that there exists a risk of collision. THE ORION - - - 307

6. —— "*Not under command*"—*Sea Collision Rules, Art.* 5, *sub-ss.* (*a*), (*c*). (*d*).] By Art. 5 of the Regulations for Preventing Collisions at Sea, sub-s. (*a*), a steamship "which from any accident is not under command, shall at night carry" in place of the white light "three red lights in globular lanterns." By sub-s. (*c*), such a ship "when making way" shall carry the side lights. By sub-s. (*d*), the lights so "required to be shewn . . . . are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way." Owing to an accident to her machinery, the speed of a steamship was reduced from 11 knots to 3 or 4 knots, but at that speed her steering power was unaffected, though she might not be able to reverse as quickly as before. She hoisted three red lights in place of the white light, and the red side light was not exhibited till the moment of collision with another vessel:—*Held*, that the words "not under command" mean, that the course of the vessel cannot be so properly controlled or directed as to enable her to get out of the way of any peril which she may have to encounter. Therefore, though there might have been deterioration in the steamship's steering power, there was no want of command in that sense, and, with the speed she was able to attain, the exhibition of the three red lights was misleading, and contributed, with the absence of the red side light, to the disaster. THE P. CALAND [313

7. —— *Jettison of Cargo—Claim for General Average.*] In a collision between a Dutch and an English steamer the former was sunk, and the latter so injured that she had to jettison cargo to keep the part of the ship damaged out of the water whilst making for a port of refuge. In an action in rem for damage by collision brought by the owners of the Dutch steamer against the English steamer, to which the owners of the latter appeared and counter-claimed, the Dutch steamer was found alone to blame. On the reference as to damages the owners of the English steamer claimed (inter alia) to recover against the owners of the Dutch steamer the balance due in general average contribution from ship to cargo in respect of the jettison, after deducting the amount due from cargo to ship in respect of the damage to the ship:—*Held*, that the claim must be disallowed, as the loss sustained by the ship in having to make the general average contribution was not directly due to the collision, but arose from the obligation to contribute, resulting from the relation between ship and cargo. THE MARPESSA. - - - - - 403

COLLISION — Practice—Action in High Court proper to be tried in County Court—Costs *See* PRACTICE. [121

COSTS—Collision—Action in High Court proper to be tried in County Court - 121
See PRACTICE.

—— Jurisdiction—Damage to ship—Negligence of dock official - - - 216
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—— Apportionment of—Salvage - - 265
See SALVAGE. 2.

—— Refreshers to counsel—Practice - 355
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COUNTY COURT — *Admiralty Jurisdiction — Breach of Charterparty—Plaintiffs' Ship within Jurisdiction—Venue—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 21—*County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 2, 4.] By s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, a county court having Admiralty jurisdiction shall have jurisdiction to try certain causes therein enumerated, viz., salvage, towage, necessaries, wages, damage to cargo or damage by collision, provided the value or amount claimed does not exceed the sums specified in the Act. By s. 21 proceedings in an Admiralty cause shall be commenced: (1) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings. By s. 1 of the County Courts Admiralty Jurisdiction Act, 1869, the two Acts of 1868 and 1869 are to be read as one. By s. 2 of the latter Act Admiralty jurisdiction is given: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship. By s. 4 of the latter Act, s. 3 of the Act of 1868 is extended so as to apply to claims for damage to ships whether by collision or otherwise. The plaintiffs, owners of a steamship, commenced an action in personam in the county court within the jurisdiction of which their vessel then was, against the defendants, the charterers, for breach of an alleged warranty in the charterparty as to the depth of water at the defendants' wharf, whereby the plaintiffs' vessel sustained damage whilst at the wharf, which was within the jurisdiction of another county court:—*Held*, that as the two Acts of 1868 and 1869 are, by s. 1 of the latter Act, to be read as one, the language of ss. 3 and 21 of the Act of 1868 is thereby extended so as to include the plaintiffs' vessel in an action instituted under s. 2 of the Act of 1869, and that consequently the county court in which the action had been commenced had jurisdiction. THE COUNTY OF DURHAM - - - - 1

2. —— *Damage to Ship—Negligence of Dock Official—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*The County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Costs.*] By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, "Any county court having admiralty jurisdiction shall have jurisdiction to try the following causes . . . (3) as to any claim for damage . . . by collision . . . in which the amount claimed does not exceed three hundred pounds." By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4, "The third section of the County Courts Admiralty Jurisdiction Act, 1868,

COUNTY COURT—*continued.*

shall extend and apply to all claims for damage to ships whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds." The plaintiffs brought an action in personam, in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, against a dock company for injuries to the amount of 221*l.* 4*s.* 6*d.* to their steamship by a collision with the dock wall, occasioned by the negligence of the servants of the dock company. The Court found the dock company liable, and on the application of the defendants to disallow the costs of the action:—*Held*, that the plaintiffs must be refused the costs of the action as it fell within the words of s. 4 of the County Courts Admiralty Jurisdiction Act, 1869, and therefore might have been brought in a county court exercising Admiralty jurisdiction. TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD. THE ZETA - - 216

3. —— *Admiralty Jurisdiction—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 21, *sub-ss.* (1) (2)—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 74.] By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21: "Proceedings in an Admiralty cause shall be commenced: (1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings. (2.) If the foregoing rule be not applicable then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates . . . resides." By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant . . . shall dwell or carry on his business at the time of commencing the action or matter." The plaintiffs, owners of a steamship, brought an action, in personam, on the Admiralty side of the county court within the district of which the defendants, charterers of the vessel, and consignees of the cargo, carried on their business, for damages for the detention of the vessel in unloading. The county court judge dismissed the action for want of jurisdiction, on the ground that, as the ship was not at the time of the commencement of the proceedings within the district, nor did the plaintiffs reside there, neither sub-s. (1) nor sub-s. (2) of s. 21 of the County Courts Admiralty Jurisdiction Act, 1868, had been complied with. On appeal:—*Held*, that the county court had jurisdiction, as the language of s. 74 of the County Courts Act, 1888, was general in its terms, and therefore included defendants in an Admiralty action who, at the time of commencing the action, carried on their business within the district. THE HERO - - - - - - - 294

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—— Damage to ship—Negligence of dock official—County Court—Jurisdiction 216
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LIMITATION OF LIABILITY—*Gross Tonnage—Navigation Spaces—The Merchant Shipping Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*The Merchant Shipping* (*Tonnage*) *Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 3, *sub-ss.* (*b.*), (*i.*), (*ii.*).] In an action for limitation of liability, the owner of a steamship, in calculating the gross tonnage upon which his statutory liability in damages—under s. 54 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63)—is based, cannot deduct the navigation spaces mentioned in s. 3, sub-ss. (b), (i.), (ii.), of the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43). THE UMBILO - - - - 118

MERSEY — Vessel carrying misleading light—Mersey Rules Act. 4. - - 184
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NAVIGATION SPACES—Limitation of liability—Gross tonnage - - 118
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NECESSARIES—*Action in rem against Foreign Ship for brokerage—The Admiralty Court Act*, 1840 (3 & 4 *Vict. c.* 65), *s.* 6.] There is no jurisdiction to entertain an action in rem against a foreign ship for brokerage on a charterparty, such a claim not falling within the meaning of the word "necessaries" in s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65). THE MARIANNE - - - - - - 180

PRACTICE — *Collision — Action in High Court proper to be tried in County Court—Costs—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* (3), *and s.* 9.] In the absence of special circumstances justifying proceedings in the Admiralty Division of the High Court, a plaintiff will not be allowed costs when, in an action of damage by collision, although he claims more, he does not recover an amount exceeding 300*l.*, that being the limit of the County Court jurisdiction under s. 3, sub-s. (3), of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). THE ASIA - - 121

PRACTICE—*continued.*

2. —— *Examination of Witness before Examiner—Correction of Transcript of Shorthand Notes—Application to take Transcript off File—Further Return—Costs.*] If, after filing in the Admiralty Registry the transcript of the shorthand notes of the evidence of a witness taken before an examiner, a mistake is discovered to have been made by the shorthand writer in transcribing his notes, application should be made by the party grieved to the Court for an order directing that the transcript be taken off the file and returned to the examiner for amendment, and the costs thereby incurred will be costs in the cause. THE KNUTSFORD - 219

3. —— *Costs—Refreshers to Counsel—Rules of Supreme Court, 1883, Order LXV., r. 27, sub-r. 48—Discretion of Taxing Officer.*] By Order LXV., r. 27, sub-r. 48, of the Rules of the Supreme Court, 1883: "As to refresher fees, when any cause or matter is to be tried or heard upon viva voce evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired, the following fees . . . ." A trial extended over two hours and a quarter on the first day, and five hours and a half on the second day. On taxation of costs, between party and party, refresher fees were allowed to the counsel of the successful party in respect of the last two and three-quarter hours on the second day. On objection to the taxation:—*Held*, that the taxing officer had a discretion to allow some refresher fee for any time during which the trial was substantially prolonged beyond five hours. *Walker v. Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) dissented from. THE COURIER - 355

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—— **Order LXV., r. 27, sub-r. 48** - - 355
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SALVAGE—*Inequitable Agreement—Grounds for setting aside.*] The fact that the parties to an agreement for salvage services about to be performed on the high seas have not contracted on equal terms will not in itself invalidate such an agreement; but if, in addition to the master of the vessel about to be salved being at a disadvantage, the sum insisted upon by the intending salvor is, in the opinion of the Court, exorbitant, the necessary elements exist for setting aside the agreement as inequitable. THE RIALTO - 175

2. —— *Action in personam—Owners of Cargo in the Salved Ship out of the Jurisdiction—Practice—Service of Notice of Writ under R.S.C., 1883, Order XI., r. 1 (g)—Apportionment of Costs.*] By the rules of the Supreme Court, 1883, Order XI., r. 1, "Service out of the jurisdiction of . . . notice of a writ of summons may be allowed by . . . a judge whenever (*g*) any person out of the jurisdiction is a . . . proper party to an action properly brought against some other person duly served within the jurisdiction":—*Held*, that under this rule where, in an action in personam for alleged salvage services rendered to ship, freight, and cargo, the plaintiffs, the owners, master, and crew of the salving vessel, had served the writ upon the owners of the salved ship resident within the jurisdiction, leave might be obtained to serve the cargo owners, out of the jurisdiction, with notice of the writ. In apportioning the costs of the salvor, payable by the owners of the salved ship and cargo respectively, *The Peace* (Swa. 115) followed. THE ELTON - - - - 265

3. —— *Award—Grounds for an Appeal Court altering the Amount.*] In salvage cases there is no rule binding a Court of Appeal not to interfere with an award, unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased if, after a careful consideration of the facts, and after giving every possible weight to the view of the judge, the Court is of opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress, or so small as to be unjust to the salvors. THE ACCOMAC — C. A. 349

SERVICE—Service of notice of writ out of jurisdiction—Salvage - - - 265
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SHIP—*Charterparty—Ambiguity—Extrinsic Evidence—Vessel "always afloat" in Dock though unable to cross Sill.*] By charterparty it was agreed between the plaintiffs, shipowners, and the defendants, charterers, that the plaintiffs' steamer, then trading, but "expected ready to load about April 10," should, "with all convenient speed, sail and proceed to the (defendants') loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo" . . . "lightorage, if any necessary, to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk and expense." The vessel was delayed by stress of weather on her inward voyage, and did not arrive at the North Dock, Swansea, until April 30, at which time the tides were taking off. Though the vessel could not completed her loading "always afloat" in the North Dock, the owners of the vessel, before all the cargo had been taken in, and to prevent her being delayed a week before she would be able again to get over the sill of the dock, removed her to another dock, and there took in the remainder of the cargo. In an action by the shipowners for freight admittedly due, the charterers, as defendants, counterclaimed for (inter alia) the cost of the carriage of the remainder of the cargo to the other dock:—*Held*, that the clause as to lightorage was ambiguous, and on extrinsic evidence being admitted shewing that the intention of the parties was that, if the steamer was not able to complete her loading at the North Dock,

SHIP—*continued.*

the defendants were to bear the expense of completing the loading elsewhere:—*Held*, further, that the shipowners were liable for the cost of the carriage to the other dock, as the vessel could, within the meaning of the charterparty, have been loaded in the North Dock, always afloat, and the fear of the detention of the vessel did not justify them in removing her. THE CURFEW - - - - - 131

2. —— *Bill of Lading—Damage to Cargo—Exceptions: Perils of the Sea occasioned by Negligence of Master—Charterparty—Condition as to Certificate of Surveyor—Insufficient Dunnage.*] A cargo of wheat was shipped by charterers on board the defendants' vessel, under a charterparty and bill of lading, both of which excepted ". . . perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence . . . of the . . . master." The charterparty, referred to in the bill of lading under the words, "all other conditions as per charterparty," contained the condition, "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water and ventilation, to be furnished to charterers from H. H. Watson, surveyor." Under this condition a certificate was furnished by the surveyor which did not specially mention dunnage, but stated that the vessel "is entitled to full confidence, can carry a dry and perishable cargo, and is a good risk for underwriters." During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and, through the leak thereby occasioned, the cargo was damaged by sea-water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea-water. Owing to the dunnage of the waterways in the 'tween decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged by sea-water. In an action for damage to cargo, brought by the plaintiff, who had purchased the cargo in transit, against the shipowner:—*Held*, that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuance of the leakage not being prevented; for, the inflow of water being a peril of the sea and an accident of navigation, the negligence of the master in respect of it was covered by the exception in the bill of lading:—*Held*, also, that the shipowner was liable for the additional damage caused by the dunnage being insufficient, as the certificate of the surveyor was not conclusive. THE CRESSINGTON - D. C. 152

3. —— *Carriage of Goods—Non-delivery—Sale at Port of Distress—Law of the Flag—Duty of Master by German Law.*] A German vessel, loading at Singapore for London, took on board, with other cargo, a quantity of pepper, shipped by British subjects under English bills of lading in the usual form. On the voyage heavy weather was experienced, and the vessel put into a port of distress, both the ship and a portion of the cargo being damaged. The master telegraphed to this effect to the ship's agent at Singapore, and the contents of the telegram were communicated to the various shippers; but no instructions were received. Thereupon the master, acting in good faith, on the best advice he could obtain, and believing it to be for the benefit of the cargo owners, sold, with other cargo, a considerable portion of the pepper, much of which might have been reshipped, and some of which was in fact sent on by the purchasers in other vessels to London, where it fetched substantially the price of sound pepper. In an action for breach of contract and conversion, brought by the plaintiffs, who were the consignees of the whole, and the purchasers of part of the pepper so sold by the master:—*Held*, that the defendants, the owners of the vessel, were not liable, as the law of the flag must be looked at to determine the propriety of the sale, and by German law the conduct of the master was justifiable. THE AUGUST - 328

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